









THE  
CIVIL LAW  
IN ITS NATURAL ORDER:

BY JEAN DOMAT.

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Translated from the French,  
BY WILLIAM STRAHAN, LL. D.  
ADVOCATE IN DOCTORS' COMMONS.

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EDITED,  
FROM THE SECOND LONDON EDITION,  
BY LUTHER S. CUSHING.

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IN TWO VOLUMES.

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VOLUME I.  
CONTAINING THE TREATISE OF LAWS, PRELIMINARY BOOK, AND  
PART I. OF ENGAGEMENTS.

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## ADVERTISEMENT.

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THE author of the following work, JEAN DOMAT, was born at Clermont, in the province of Auvergne, in France, on the 30th of November, 1625, and died in Paris, in 1696. Having been educated to the profession of the law, he was appointed king's advocate in the presidial court of Clermont, which office he held and exercised for thirty years. Besides attending to his official duties, Domat undertook the task of reducing to order the civil laws of his country, so far at least as they were identical with, or founded in, those of the Roman Code. His general plan was, in the first place, to unite, classify, and arrange, in their natural order, the principles of the civil laws, properly so called; then, to digest and arrange in order those principles which more properly belonged to the public law; and, lastly, to make a selection from the texts of the Roman law of such as might be most useful for the understanding of the French law. The first and most important of these works was published at Paris, in 1694, two years before the author's death. The second was not published until after his decease.

The celebrated Chancellor D'Aguesseau, then advocate-general at Paris, and who, at a later period of his life, assisted and encouraged Pothier in the publication of his *Pandects*, was instrumental in facilitating the execution of Domat's work, by bringing the author to Paris, and introducing him to the favor and notice of the king. His opin-

son of *The Civil Law in its Natural Order* is expressed in the following recommendation, long afterwards addressed to his son, advising him to study that work:—

“No one has gone more profoundly than Domat into the true principles of law, or explained them in a manner more worthy of a philosopher, of a juriconsult, and of a Christian. After having ascended to first principles, he descends and follows them out even to their most remote consequences. He develops them in an order almost geometrical. All the different kinds of laws are detailed in his work, with the characters which distinguish them. It is the best made and the most finished plan of civil society; and I have always regarded it as a precious work, which I have seen grow and almost spring into birth from between my own hands, such was the author's friendship for me. You ought to esteem yourself happy, my dear son, to find this work written before you entered upon the study of jurisprudence. You will imbibe from it the spirit, not only of a juriconsult, but of a legislator, if you read it with the attention which it deserves: and you will be enabled, by the principles which it will give you, to distinguish for yourself, in the course of your reading, that which belongs to natural and immutable justice from that which is only the work of a positive and arbitrary will; to avoid being dazzled by the subtilties which are frequently diffused in the Roman juriconsults; and to draw with safety, from their treasury of reason and common sense, the principles collected together in the Digest.”

The work of Domat at once attained a great celebrity in France, and appears to have since maintained its reputation there, notwithstanding the publication of the more copious and extended treatises of Pothier, which are of very great merit and value, and notwithstanding the compilation and introduction of the new codes. An edition of it was published in Paris in 1829, with references to the codes, and notes of the decisions under them, by Joseph Remy.

The treatise of *The Civil Law in its Natural Order* was translated into English by DR. STRAHAN, and first published in London, together with a translation of *The Public Law*, in two volumes, folio, in 1720. A second edition appeared in 1737. The following extracts from the translator's preface will serve to explain his views of the importance and utility of the work to his Countrymen:—

“The author's design in compiling this work was, not to make a new abridgment of the whole body of the civil law, which had been done long before his time by many eminent hands; but his view was to give to the world something new in its kind, and what had not been attempted by any other lawyer before him; to wit, a collection out of the body of the civil law of all the natural rules of justice and equity which are applicable to the most common transactions between man and man, either in a private or public capacity, in a clear and easy method, and disentangled from the niceties and forms of law, with which they are mixed and interwoven in the body of the civil law.

“It is most certain, that it is in the body of the civil law that we have the most complete, if not the only, collection of the rules of natural reason and equity, which are to govern the actions of mankind; and therefore it is that it has been called *ratio scripta*, written reason, as containing the most perfect rules of reason for deciding all differences that may arise among men in their intercourse with one another. But the Roman lawyers who were the compilers of that work, having inserted therein many things peculiar to their own form of government which are now obsolete, and having intermixed with the fundamental principles of justice and equity some niceties of the law which are not of so general use at present, and which render the study of the civil law too irksome and tedious for those who do not intend to make it their profession; the author of this collection has removed that difficulty by leaving out such parts of the civil law as are not at present of so general use,

and selecting all the fundamental maxims of law and equity, which must be the same in all countries, and applying them to the most common affairs of human life, in a plain, easy method, and in their natural order. So that the reader here finds under the same title, all the rules of law which have any relation to the subject of the said title, and which lie dispersed under different titles in the body of the Roman laws, and cannot be there learned without great study and application:

“This work no sooner appeared in public, than it was received with universal applause among men of learning, and has been justly reckoned one of the improvements of learning which we owe to the last century. There have been several editions thereof in France in a few years; and it has been thought to be of so great use in other countries, that it has been translated into several other languages. I thought that it might not be of less service here in England than in other countries, and therefore was induced to render it into English, that all the subjects of this kingdom in general might have the benefit of it. There are many persons of great learning in England, who have not had opportunities of acquiring such a thorough knowledge of the French tongue as to be able to understand perfectly the books which are written in that language. And even many of those who are sufficiently masters of the French language, so as to understand their historians and books of novels, may not be so well acquainted either with the French or civil law terms which frequently occur in this work, and which make a translation thereof the more necessary for the English reader. And the subject-matter of this book being of so general use to all mankind, I dare flatter myself that a translation of it, when the book comes to be more universally known here in England, will be allowed to be of real service to the country, and be at least as well received as a translation of any French or Latin historical whatsoever.

" Since I first read this book, I have always been of opinion that an English translation of it would be of the greatest service here in England; and the rather, because of late years the study of the civil law here in England has been so much neglected, and has met with so great discouragement, that we are in a manner become strangers to it; and, under a groundless apprehension of its being an encroachment on the law of the land, we are like to lose all the real advantages which may be reaped from it in subserviency to our own laws, and which all other nations, except ourselves, do at this day enjoy.

" In all other countries where the study of the Civil Law is cultivated, they have peculiar laws and customs of their own, of which they are as tenacious as we can possibly be of ours. And yet they are so far from banishing or discouraging the study of the civil law, under an apprehension of its encroaching upon their own municipal laws, that, on the contrary, they give the professors thereof all possible encouragement; they study it as a qualification for the better understanding of their own laws, and make it subservient to them in all respects, by applying the general rules of natural reason and equity which are contained therein to clear up any difficulties or obscurities, and to supply any defects or omissions that may occur in their own municipal laws. And this is the only use that is made of the civil law in most countries at this day; not that they receive it by virtue of any power or authority that the Roman emperors had to impose their laws upon other nations, which pretence now must be looked upon as very frivolous ever since the declension of the Roman empire; but they receive it only as containing the most complete, if not the only, collection of rules of natural reason and equity, which may come in aid of their own municipal laws, and serve as a rule for deciding all cases wherein their own laws and customs are silent."

The late Mr. Justice Story, in the preface to his work on



*Edilments*, the pages of which bear ample testimony to the use which the learned author has made of Domat's labors, thus bears emphatic testimony to his merits: — "The work of Domat, entitled *The Civil Law in its Natural Order*, considering the age and the circumstances under which it was written, is a truly wonderful performance. His method is excellent, and his matter clear, exact, and comprehensive."

The object of the author, in this learned treatise, was to disembarass those of the principles and provisions of the Roman law which are of general interest and application from the technicalities with which they are more or less accompanied in the compilations of Justinian; and, by presenting them in a natural and at the same time scientific method, to render them more intelligible, and their attainment more easy and agreeable, to those who have not made the system of the Roman law a distinct study. And though the work was particularly adapted to the French jurisprudence of the age in which it was written, it is not less applicable at the present day to every system of legal institutions, of which the Roman law is either a part, or in which it is recognized and resorted to as a body of written reason. Presenting the results of the Roman jurisprudence, without the processes by which those results have been attained, the work of Domat is entirely different in its character from the productions of those modern writers on the Roman law, who proceed by an historical investigation of the origin and sources of its various branches. It is thus less philosophical, but more practical; and hence its great popularity in France, and its peculiar adaptation to the wants of the profession in England and in this country.

Besides the general claims which *The Civil Law in its Natural Order* may be said to offer to the attention of the English or American lawyer, it has a peculiar interest in those States and Territories of the United States, and in those of the colonial and provincial dependencies of Great Britain, the legal institutions of which, being derived in

part from those of France, Spain, or Holland, are founded to a greater or less extent in the Roman law.

These considerations have induced a belief, on the part of the publishers, that a modern edition of this celebrated work would be acceptable to the profession, and have led them to undertake a republication of the English translation of it by Dr. Strahan, under the superintendence of the present editor.

In the preparation of this edition, the principal purpose of the editor, in compliance with the wishes of the publishers, has been to bring the translation within a reasonable compass, without omitting any portion of the original work. This has been effected by leaving out for the most part the texts of the Roman law referred to and cited by the author, which, in the translation, are quoted at length; and by omitting nearly all the translator's notes, which, being merely explanatory of the common and statute law of England, as it stood in his time, would be entirely unsatisfactory at the present day, and may therefore very well be spared. The texts, however, have been inserted in some cases, where they seemed necessary in order to render the author's remarks intelligible. Where the translator's notes have been retained, they are included in brackets.

The notes of the author himself, although referring in many instances to the old French law, which, in form at least, has been superseded by the modern codes, have been scrupulously retained; inasmuch as, in every place out of France where French law still prevails to any extent, it is the old law, and not the new codes, to which recourse must be had.

The references to the Roman law, which are made according to the method in use in Domat's time, have been preserved. Being now as accurate, probably, as they could be made upon any system, it was thought that the risk of mistakes, in changing them for any of the more modern forms of citing, would be hardly compensated by any sup-

## ADVERTISEMENT.

posed advantages of the latter over the former. But in order to render the references readily intelligible, and to facilitate the use of them, an alphabetical list of all the rubrics of the several titles of the *Institutes*, *Digest*, and *Code* is subjoined in an Appendix to the second volume, preceded by an explanation of the manner in which the references to them are made.

The translation of Dr. Strahan, though substantially accurate, is by no means an elegant production. But, as it did not consist either with the avocations of the editor, or with the wishes of the publishers, to make a new one, nothing more has been attempted than to improve the old. The work has accordingly been collated with the latest French edition; the translation, where it has been found to be erroneous, has been made to conform to the original; the orthography and punctuation have been carefully revised; antiquated and peculiar expressions have been modified; and such errors of the press as had escaped notice in the former editions have been corrected.

In order to facilitate a reference to the work, the paragraphs have been numbered consecutively, from the beginning to the end. The only mode of reference to the former editions is by the Part, Book, Title, Section, and Article, or by the volume and page. The present edition may be referred to simply by the number of the paragraph. The marginal notes of the translator have been placed at the head, instead of the side, of the several paragraphs.

A new and complete index, prepared for this edition by Henry Ware, Esq., of Boston, is appended to the second volume.

L. S. C.

Boston, October 1, 1850.

# CONTENTS

OF

## THE FIRST VOLUME.

### TREATISE OF LAWS.

	PAGE
CHAP. I. Of the First Principles of all Laws . . . . .	1
II. A Plan of Society, on the Foundation of the First Two Laws, by Two Kinds of Engagements . . . . .	8
III. Of the First Kind of Engagements . . . . .	11
IV. Of the Second Kind of Engagements . . . . .	16
V. Of some General Rules which arise from the Engagements that have been mentioned in the Preceding Chapter, and which are so many Principles of the Civil Law . . . . .	22
VI. Of the Nature of Friendships, and their Use in Society . . . .	26
VII. Of Successions . . . . .	31
VIII. Of Three Sorts of Troubles which disturb the Order of Society .	32
IX. Of the State of Society after the Fall of Man, and how God makes it to subsist . . . . .	33
X. Of Religion and Policy : and of the Ministry of the Spiritual and Temporal Powers . . . . .	41
XI. Of the Nature and Spirit of Laws, and their Different Kinds . .	49
XII. Reflections on some Remarks in the Preceding Chapter, which are a Foundation of several Rules touching the Use and Interpreta- tion of Laws . . . . .	82
XIII. A General Idea of the Subject-Matters of all the Laws : Reasons for making Choice of those which shall be treated of in this Book . . . . .	92
XIV. A Plan of the Matters contained in this Book of the Civil Law in its Natural Order . . . . .	96

# THE CIVIL LAW.

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## PRELIMINARY BOOK.

### OF THE RULES OF LAW IN GENERAL, PERSONS, AND THINGS.

#### TITLE I.

##### OF THE RULES OF LAW IN GENERAL.

SECT. I.	Of the several Sorts of Rules, and of their Nature . . . . .	108
II.	Of the Use and Interpretation of Rules . . . . .	116

#### TITLE II.

##### OF PERSONS.

SECT. I.	Of the State of Persons by Nature . . . . .	135
II.	Of the State of Persons by the Civil Law . . . . .	141

#### TITLE III.

##### OF THINGS.

SECT. I.	Distinctions of Things by Nature . . . . .	149
II.	Distinctions of Things by the Civil Laws . . . . .	152

---

## PART I.

### OF ENGAGEMENTS.

#### BOOK I.

##### OF VOLUNTARY AND MUTUAL ENGAGEMENTS BY COVENANTS.

#### TITLE I.

##### OF COVENANTS IN GENERAL.

SECT. I.	Of the Nature of Covenants, and the Ways by which they are formed . . . . .	160
II.	Of the Principles which arise from the Nature of Covenants, and of the Rules for interpreting them . . . . .	165

<b>SECT. III.</b>	Of Engagements which follow naturally from Covenants, although they be not particularly mentioned therein . . . . .	171
<b>IV.</b>	Of the several Sorts of Pacts which may be added to Covenants; and particularly of Conditions . . . . .	178
<b>V.</b>	Of Covenants which are Null in their Origin . . . . .	187
<b>VI.</b>	Of the Dissolution of Covenants which were not Null . . . . .	192

## TITLE II.

### OF THE CONTRACT OF SALE.

<b>SECT. I.</b>	Of the Nature of the Contract of Sale, and in what Manner it is perfected . . . . .	197
<b>II.</b>	Of the Engagements which the Seller is under to the Buyer . . . . .	199
<b>III.</b>	Of the Engagements which the Buyer is under to the Seller . . . . .	208
<b>IV.</b>	Of the Merchandise, or Thing which is sold . . . . .	212
<b>V.</b>	Of the Price . . . . .	215
<b>VI.</b>	Of Conditions and other Pacts in a Contract of Sale . . . . .	217
<b>VII.</b>	Of the Changes of the Thing sold; and how the Loss or Gain accruing thereby belongs to the Seller, or to the Buyer . . . . .	219
<b>VIII.</b>	Of Sales that are Null . . . . .	224
<b>IX.</b>	Of the Rescission of Sales, on Account of the Lowness of the Price . . . . .	228
<b>X.</b>	Of Eviction, and other Troubles to the Purchaser . . . . .	230
<b>XI.</b>	Of Redhibition and Abatement of the Price . . . . .	237
<b>XII.</b>	Of other Causes of the Dissolution of Sales . . . . .	243
<b>XIII.</b>	Of some Matters which have Relation to the Contract of Sale . . . . .	248

## TITLE III.

<b>OF EXCHANGE</b> . . . . .	252
------------------------------	-----

## TITLE IV.

### OF HIRING, AND LETTING TO HIRE, AND OF THE SEVERAL KINDS OF LEASES.

<b>SECT. I.</b>	Of the Nature of Letting and Hiring . . . . .	256
<b>II.</b>	Of the Engagements of the Lessee . . . . .	259
<b>III.</b>	Of the Engagements of the Lessor . . . . .	264
<b>IV.</b>	Of the Nature of the Leases of Farms . . . . .	267
<b>V.</b>	Of the Engagements which the Farmer is under to the Proprietor . . . . .	271
<b>VI.</b>	Of the Engagements which the Proprietor is under to the Farmer . . . . .	274
<b>VII.</b>	Of the Nature of Undertakings of Work by the Great, and of other Ways of letting out Man's Labor and Industry . . . . .	276
<b>VIII.</b>	Of the Engagements of the Person who undertakes any Work or Labor . . . . .	278
<b>IX.</b>	Of the Engagements of the Person who gives out any Work or Business to be done . . . . .	281
<b>X.</b>	Of Leases of Perpetuity, or for a Long Term of Years . . . . .	283
<b>VOL. I.</b>	b	

## TITLE V.

OF THE LOAN OF THINGS TO BE RESTORED IN SPECIE, AND OF A PRECARIOUS LOAN.

<b>SECT. I.</b> <i>Of the Nature of the Loan of Things to be restored in Specie, and of a Precarious Loan</i> . . . . .	289
II. <i>Of the Engagements of the Borrower</i> . . . . .	293
III. <i>Of the Engagements of the Lender</i> . . . . .	297

## TITLE VI.

OF THE LOAN OF MONEY, AND OTHER THINGS TO BE RESTORED IN KIND; AND OF USURY.

<b>SECT. I.</b> <i>Of the Nature of the Loan of Things to be restored in Kind</i> . . . . .	317
II. <i>Of the Engagements of the Lender</i> . . . . .	321
III. <i>Of the Engagements of the Borrower</i> . . . . .	322
IV. <i>Of the Prohibitions to lend Money to Sons living under the Paternal Jurisdiction</i> . . . . .	324

## TITLE VII.

OF A DEPOSIT, AND OF SEQUESTRATION.

<b>SECT. I.</b> <i>Of the Nature of a Deposit</i> . . . . .	329
II. <i>Of the Engagements of the Depositor</i> . . . . .	334
III. <i>Of the Engagements of the Depositary, and his Heirs, Executors, or Administrators</i> . . . . .	335
IV. <i>Of Sequestration by Consent of Parties</i> . . . . .	340
V. <i>Of a Necessary Deposit</i> . . . . .	342

## TITLE VIII.

OF PARTNERSHIP.

<b>SECT. I.</b> <i>Of the Nature of Partnership</i> . . . . .	344
II. <i>In what Manner Partnership is contracted</i> . . . . .	347
III. <i>Of the several Sorts of Partnerships</i> . . . . .	351
IV. <i>Of the Engagements of Partners</i> . . . . .	355
V. <i>Of the Dissolution of the Partnership</i> . . . . .	363
VI. <i>Of the Effect of the Partnership with Regard to the Heirs and Executors of the Partners</i> . . . . .	368

## TITLE IX.

OF DOWRIES, OR MARRIAGE PORTIONS.

<b>SECT. I.</b> <i>Of the Nature of Dowries, or Marriage Portions</i> . . . . .	375
II. <i>Of the Persons who give the Dowry, and of their Engagements</i> . . . . .	380
III. <i>Of the Engagements of the Husband with Respect to the Dowry, and of the Restitution of the Dowry</i> . . . . .	384

SECT. IV. Of the Paraphernal Goods . . . . .	390
V. Of the Separation of Goods between the Husband and Wife . . . . .	394

## TITLE X.

### OF DONATIONS THAT HAVE THEIR EFFECT IN THE LIFETIME OF THE DONOR.

SECT. I. Of the Nature of Donations that take Effect in the Lifetime of the Donor . . . . .	400
II. Of the Engagements of the Donor . . . . .	405
III. Of the Engagements of the Donee, and of the Revoking of Donations . . . . .	406

## TITLE XI.

### OF USUFRUCT.

SECT. I. Of the Nature of Usufruct, and of the Rights of the Usufructuary . . . . .	409
II. Of Use and Habitation . . . . .	415
III. Of the Usufruct of Things which are consumed or impaired by Use . . . . .	419
IV. Of the Engagements of the Usufructuary, and of him who has the bare Use, to the Proprietor . . . . .	423
V. Of the Engagements which the Proprietor is under to the Usufructuary, and to him who has the bare Use . . . . .	426
VI. How Usufruct, Use, and Habitation expire . . . . .	427

## TITLE XII.

### OF SERVICES.

SECT. I. Of the Nature of Services, of their Kinds, and the Manner how they are acquired . . . . .	432
II. Of the Services of Houses and other Buildings . . . . .	439
III. Of the Services of Lands . . . . .	442
IV. Of the Engagements of the Proprietor of the Land or Tenement which owes the Service . . . . .	444
V. Of the Engagements of the Proprietor of the Land or Tenement for which a Service is due . . . . .	446
VI. How Services come to cease . . . . .	448

## TITLE XIII.

### OF TRANSACTIONS.

SECT. I. Of the Nature and Effect of Transactions . . . . .	452
II. Of the Dissolution of Transactions, and of Nullities in them . . . . .	455

## TITLE XIV.

### OF COMPROMISES.

SECT. I. Of the Nature of Compromises, and of their Effect . . . . .	459
--	-----



<b>SECT. II.</b> Of the Power and Engagement of Arbitrators; and who may be an Arbitrator, and who not . . . . .	461
--	-----

## TITLE XV.

### OF PROXIES, MANDATES, AND COMMISSIONS.

<b>SECT. I.</b> Of the Nature of Proxies, Mandates, and Commissions . . . . .	465
II. Of the Engagements of the Person who employs another as his Proxy, Factor, or Agent, in any Business . . . . .	469
III. Of the Engagements of a Proxy and other Agents; and of their Power . . . . .	472
IV. In what Manner the Power of the Proxy or other Agent expires . . . . .	476

## TITLE XVI.

### OF PERSONS WHO DRIVE ANY PUBLIC TRADE, OF THEIR FACTORS AND AGENTS, AND OF BILLS OF EXCHANGE.

<b>SECT. I.</b> Of the Engagements of Innkeepers . . . . .	481
II. Of the Engagements of Masters of Ships, Coachmen, and Carriers . . . . .	483
III. Of the Engagements of those who carry on any other Public Trade, by Land or by Sea . . . . .	485
IV. Of Bills of Exchange . . . . .	488

## TITLE XVII.

### OF BROKERS, OR DRIVERS OF BARGAINS.

<b>SECT. I.</b> Of the Engagements of Brokers . . . . .	492
II. Of the Engagements of those who employ Brokers . . . . .	493

## TITLE XVIII.

### OF THE VICES OF COVENANTS.

<b>SECT. I.</b> Of Ignorance or Error in Point of Fact or Law . . . . .	497
II. Of Force . . . . .	503
III. Of Fraud and Stellation . . . . .	510
IV. Of Unlawful and Dishonest Covenants . . . . .	513

## BOOK II.

### OF ENGAGEMENTS WHICH ARE FORMED WITHOUT A COVENANT.

## TITLE I.

### OF TUTORS.

<b>SECT. I.</b> Of Tutors, and of their Nomination . . . . .	520.
II. Of the Power of Tutors . . . . .	524

SECT. III.	Of the Engagements of Tutors . . . . .	529
IV.	Of the Engagements of those who are Surrogies for Tutors; and of those who name them; and of their Heirs and Executors . . . . .	542
V.	Of the Engagements of Minors to their Tutors . . . . .	544
VI.	Of the Ways which put an End to the Tutorship, and of the Deprivation of Tutors . . . . .	547
VII.	Of the Causes which render Persons incapable of being Tutors, and of those which excuse them from that Office . . . . .	549

## TITLE II.

### OF CURATORS.

SECT. I.	Of the several Sorts of Curators, and of their Power . . . . .	558
II.	Of the Engagements of Curators . . . . .	583
III.	Of the Engagements of those to whom Curators are assigned . . . . .	594

## TITLE III.

### OF SYNDICS, DIRECTORS, AND OTHER ADMINISTRATORS OF COMPANIES AND CORPORATIONS.

SECT. I.	Of the Nomination of Syndics, Directors, and other Administrators of Companies and Corporations, and of their Power . . . . .	567
II.	Of the Engagements of Syndics and other Directors . . . . .	569
III.	Of the Engagements of Corporations and Communities who commit the Administration of their Affairs to Syndics, Directors, or others . . . . .	570

## TITLE IV.

### OF THOSE WHO MANAGE THE AFFAIRS OF OTHERS WITHOUT THEIR KNOWLEDGE.

SECT. I.	Of the Engagements of him who does the Business of another Person without his Knowledge . . . . .	573
II.	Of the Engagements of the Person whose Business hath been managed by another, without his Knowledge . . . . .	577

## TITLE V.

### OF THOSE WHO CHANCE TO HAVE ANY THING IN COMMON TOGETHER, WITHOUT A COVENANT.

SECT. I.	How one and the same Thing may belong in Common to several Persons, without a Covenant . . . . .	582
II.	Of the Mutual Engagements of those who have Something in Common together, without a Covenant . . . . .	583

## TITLE VI.

OF THOSE WHO HAVE LANDS OR TENEMENTS BORDERING UPON ONE ANOTHER.

SECT. I.	How Lands or Tenements border and confine upon one another	589
II.	Of the Reciprocal Engagements of the Proprietors or Possessors of Lands and Tenements bordering upon one another	591

## TITLE VII.

OF THOSE WHO RECEIVE WHAT IS NOT THEIR DUE, OR WHO HAPPEN TO HAVE IN THEIR POSSESSION THE THING OF ANOTHER, WITHOUT A COVENANT.

SECT. I.	Some Examples of the Cases which are the Subject-Matter of this Title, and which have Nothing in them that is Unlawful	595
II.	Other Examples of the same Matter, in Cases of Unlawful Acts	599
III.	Of the Engagements of him who hath Something belonging to another Person without a Covenant	601
IV.	Of the Engagements of the Master of the Thing	603

## TITLE VIII.

OF DAMAGES OCCASIONED BY FAULTS WHICH DO NOT AMOUNT TO A CRIME OR OFFENCE.

SECT. I.	Of that which is thrown out of a House, or which may fall down from it, and do some Damage	604
II.	Of Damages done by Living Creatures	607
III.	Of the Damage which may happen by the Fall of a Building, or of any new Work	611
IV.	Of other Kinds of Damages occasioned by Faults, without either Crime or Offence	617

## TITLE IX.

OF ENGAGEMENTS WHICH ARE FORMED BY ACCIDENTS.

SECT. I.	In what Manner are formed the Engagements which arise from Accidents	623
II.	Of the Consequences of the Engagements which are formed by Accidents	628

## TITLE X.

OF THAT WHICH IS DONE TO DEFRAUD CREDITORS.

SECT. I.	Of the several Sorts of Frauds which are done to the Prejudice of Creditors	638
II.	Of the Engagements of those who commit these Frauds, or who partake in them	643

# BOOK III.

## OF THE CONSEQUENCES WHICH ADD TO ENGAGEMENTS, OR WHICH STRENGTHEN AND CORROBORATE THEM.

### TITLE I.

#### OF PAWNS AND MORTGAGES, AND OF THE PRIVILEGES OF CREDITORS.

SECT. I.	Of the Nature of a Pawn and Mortgage, and of the Things which are capable of being thus engaged or not . . . . .	646
II.	Of the several Sorts of Mortgages, and of the Manner how a Mortgage is acquired . . . . .	662
III.	Of the Effects of the Mortgage, and of the Engagements which it forms on the Debtor's Part . . . . .	666
IV.	Of the Engagements of the Creditor to the Debtor, because of the Pawn or Mortgage . . . . .	677
V.	Of the Privileges of Creditors . . . . .	680
VI.	Of Substitution to the Mortgage or to the Privilege of the Creditor . . . . .	694
VII.	In what Manner the Mortgage ends, or is extinguished . . . . .	700

### TITLE II.

#### OF THE SEPARATION OF THE GOODS OF THE DECEASED FROM THOSE OF THEIR HEIR OR EXECUTOR, BETWEEN THEIR RESPECTIVE CREDITORS.

SECT. I.	Of the Nature and Effects of the Separation . . . . .	708
II.	In what Manner the Right of Separation is extinguished or lost . . . . .	711

### TITLE III.

#### OF THE SOLIDITY AMONG TWO OR MORE DEBTORS, AND AMONG TWO OR MORE CREDITORS.

SECT. I.	Of Solidity among Debtors . . . . .	713
II.	Of Solidity among Creditors . . . . .	717

### TITLE IV.

#### OF CAUTIONS, OR SURETIES.

SECT. I.	The Nature of the Obligation of Cautions or Sureties, and the Manner in which it is contracted . . . . .	720
II.	Of the Engagements of the Surety to the Creditor . . . . .	726
III.	Of the Engagements of the Debtor towards his Surety, and of the Surety towards the Debtor . . . . .	730
IV.	Of the Engagements of Sureties to one another . . . . .	735
V.	How the Engagement of Sureties ends, or is annulled . . . . .	736

## TITLE V.

OF INTEREST, COSTS, AND DAMAGES, AND RESTITUTION OF FRUITS.

SECT. I.	Of Interest . . . . .	760
II.	Of Damages . . . . .	768
III.	Of the Restitution of Fruits . . . . .	761

## TITLE VI.

OF PROOFS AND PRESUMPTIONS, AND OF AN OATH.

SECT. I.	Of Proofs in General . . . . .	794
II.	Of Proofs by Writing . . . . .	799
III.	Of Proofs by Witnesses . . . . .	807
IV.	Of Presumptions . . . . .	817
V.	Of the Interrogation and Confession of the Parties . . . . .	827
VI.	Of an Oath . . . . .	832

## TITLE VII.

OF POSSESSION AND PRESCRIPTION.

SECT. I.	Of the Nature of Possession . . . . .	845
II.	Of the Connection between Possession and Property, and how one may acquire or lose the Possession . . . . .	852
III.	Of the Effects of Possession . . . . .	864
IV.	Of the Nature and Use of Prescription, and of the Manner in which it is acquired . . . . .	867
V.	Of the Causes which hinder Prescription . . . . .	881

## BOOK IV.

OF THE CONSEQUENCES WHICH ANNUL OR DIMINISH ENGAGEMENTS.

## TITLE I.

OF PAYMENTS.

SECT. I.	Of the Nature of Payments, and of their Effects . . . . .	892
II.	Of the several Ways of making Payment . . . . .	897
III.	Who may make a Payment, or receive it . . . . .	901
IV.	Of the Imputation of Payments . . . . .	905

## TITLE II.

OF COMPENSATIONS.

SECT. I.	Of the Nature of Compensations, and of their Effect . . . . .	909
II.	Among what Persons Compensation takes Place, and in what Debts . . . . .	914

TITLE III.

OF NOVATIONS.

SECT. I. Of the Nature of Novation, and of its Effect . . . . .	915
II. What Persons have Power to make Novations, and of what Debts . . . . .	917

TITLE IV.

OF DELEGATIONS . . . . .	918
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TITLE V.

OF THE CESSION OF GOODS, AND OF DISCOMFITURE.

SECT. I. Of the Cession of Goods . . . . .	922
II. Of Discomfiture, or the Insolvency of Debtors . . . . .	927

TITLE VI.

OF THE RESCISSION OF CONTRACTS, AND RESTITUTION OF THINGS TO THEIR FIRST ESTATE.

SECT. I. Of Rescissions and Restitutions in General . . . . .	931
II. Of the Restitution of Minors . . . . .	937
III. Of the Rescission of Contracts in Favor of Majors . . . . .	951



**A**

**TREATISE OF LAWS.**





# TREATISE OF LAWS:

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## CHAPTER I.

### OF THE FIRST PRINCIPLES OF ALL LAWS.

#### 1. *The First Principles of Laws were unknown to Pagans.*

ONE would think, that, nothing ought to be better known by men than the first principles of the laws which regulate both the conduct of every one in particular, and the order of the society which they compose together: and that even those persons who have not the advantages of religion, by which we learn what those principles are, ought at least to discover them in their own breasts, seeing they are engraved on all our hearts by nature. Nevertheless, we see that the most learned of those who were ignorant of what religion teaches us concerning them, knew so little of them, that they have established rules which violate and destroy them.

Thus the Romans, who have excelled all other nations in cultivating the civil laws, and who have made so great a number of very just ones, took the same license as other people did, to take away the lives of their slaves and of their own children. As if the power which the quality of father, and that of master, gave them, could dispense with the laws of humanity.

This extreme opposition between the equity which shines in the just laws made by the Romans, and the inhumanity of this license, shows plainly that they were ignorant of the sources of

That very justice which they understood, since they violated in so gross a manner, by these barbarous laws, the spirit of those principles which are the foundations of all the justice and equity that is in their other laws.

This error is not the only one by which we may judge how much they were strangers to the knowledge of those principles; we have another very remarkable proof of it, in the idea which their philosophers gave them of the origin of the society of mankind, of which those principles are the foundation. For they were so far from knowing them, and from perceiving how they ought to form the union of men, that they imagined that men lived at first as wild beasts in the fields, without any communication, and without any tie to one another, until one of them bethought himself that it was possible to join them together in society, and began to civilize them for that purpose.<sup>b</sup>

We shall not stop here to inquire into the causes of this strange contrariety of light and darkness in men who were the most learned of all the heathens; and how they could know so many rules of justice and equity, without perceiving in them the principles on which they depend. The very first elements of the Christian religion explain this riddle; and what it teaches us concerning the state of man, discovers to us the causes of this blindness, and informs us at the same time what are these first principles which God has established, as the foundations of the order of the society of mankind, and which are the sources of all the rules of justice and equity.

But although these principles are known to us only by the light of religion, yet it points them out to us in our very nature, with so much clearness, that we see plainly that man is ignorant of them only because he does not know himself; and therefore that nothing is more astonishing than the blindness that hinders him from seeing them.

## II. *The Certainty of the Principles of Laws.*

Since, therefore, there is nothing more necessary in sciences, than to possess the first principles of them, and that every science begins with establishing its own principles, and setting them in such a light as may best discover their truth and their certainty, that they may serve for a foundation to all the par-

<sup>b</sup> *Cic. de inv., L. 1, S. 2.*

particulars which are to depend upon them; it is of importance to consider what are the principles of laws, in order to know the nature and firmness of the rules which depend on them. And we may judge of the certainty of these principles, by the double impression which such truths ought to make upon our minds, which God reveals to us by religion, and makes us to apprehend by our reason. So that we may say, that the first principles of laws have a character of truth, which touches and persuades more than that of the principles of other human sciences. And that whereas the principles of other sciences, and the particular truths which depend upon them, are only the object of the mind, and not of the heart, and that they do not even enter into the minds of all persons; the first principles of laws, and the particular rules essential to these principles, have a character of truth which every body is capable of knowing, and which affects the mind and the heart alike. Thus the whole man is penetrated by them, and more strongly convinced of them than of the truths of all the other human sciences.

There is nobody, for instance, but whose heart and mind tell him, that it is not lawful to kill him, or to rob him, nor to kill or rob others; and who is there that is not more fully persuaded of these truths than of any theorem of geometry? Nevertheless these very truths, that murder and robbery are unlawful, however clear and evident they are, have not a degree of certainty equal to that of the first principles on which they depend; for whereas these principles are rules which admit of no dispensation or exception, these truths are liable to exceptions and dispensations. As for instance, Abraham might lawfully kill his son, when the Lord of life and death commanded him to do it: and the Hebrews took, without any crime, the riches of the Egyptians, by order of the Master of the universe, who gave these riches to them.<sup>d</sup>

### III. *The Knowledge of the First Principles of Laws is attained to by the Knowledge of Man.*

We cannot take a more simple and surer way for discovering the first principles of laws, than by supposing two prime truths, which are only bare definitions. One is, that the laws of man are nothing else but the rules of his conduct; and the

<sup>c</sup> Gen. xxii. 2.

<sup>d</sup> Exod. xi. 2; xii. 36.

other, that the said conduct is nothing else but the steps which a man makes towards his end.

In order, therefore, to discover the first foundations of the laws of man, it is necessary to know what is the end of man; because his destination to that end will be the first rule of the way, and of the steps that lead him to it, and consequently his first law, and the foundation of all the others.

To know the end of a thing, is only to know why it is made. And we know why a thing is made, if, by observing how it is made, we discover what its structure may have relation to. Because it is certain, that God has proportioned the nature of every thing to the end for which he has designed it.

We all know and feel, that man hath a soul which animates a body, and that in this soul there are two powers or faculties; an understanding, which is capable of knowing, and a will, capable of loving. Thus we see that it is to know, and to love, that God has made man, and consequently that it is to unite himself to some object, in the knowledge and love of which his quiet and happiness consist; and that it is towards this object that he ought to direct all his steps. From whence it follows, that the first law of man is his destination to the knowledge and love of that object, which ought to be his end, and in which he is to find his happiness: and that it is this law, which, being the rule of all his actions, ought to be the principle of all his laws.

To know, therefore, what is this first law, what is the spirit of it, and in what manner it is the foundation of all others, we must see for what object it is that the said law designs us.

Among all the objects which offer themselves to man, in the whole world, even including man himself, there will be none of them found that is worthy of being his end. For in himself, he will be so far from finding his happiness there, that he will see nothing there but the seeds of misery and death: and round about him, if we go over the whole universe, we shall find nothing there that is capable of being proposed as an end, either to his mind, or to his heart: and that the things which we see there are so far from being considered as our end, that we are theirs: and that it is only for us that God has made them.\* For

all that is contained in the earth and in the heavens is only a provision made of things necessary for all our wants, which will perish when they cease. And we see plainly, that every thing there is so little worthy both of our mind and our heart; that as for the mind, God hath hidden from it all other knowledge of the creatures, besides what concerns the ways of using them well; and that the sciences, which apply themselves to the knowledge of their nature, discover nothing in them besides what may be of use to us, and grow darker and more unintelligible, the more they attempt to penetrate into that which is of no use to us.<sup>f</sup> And as for the heart, every body knows that the whole world is not capable of filling it; and that it was never able to make any of those persons happy, who have set their affections most upon it, and have enjoyed the greatest share of it. Every body is so fully convinced of this truth, that there is no occasion to persuade any one of it. And in fine, we must learn from him who has formed man, that it is he alone who, as he is his principle, is also his end:<sup>g</sup> and that it is only God alone who is able to fill the infinite vacuity of that mind and of that heart which he has made for himself.<sup>h</sup>

It is therefore for God himself that God has made man.<sup>i</sup> It is that he may know him, that he has given him an understanding; it is that he may love him, that he has given him a will; and it is by the ties of this knowledge, and of this love, that he would have men to unite themselves to him, that they may find in him their true life, and their only happiness.<sup>j</sup>

It is this construction of man, who is formed to know and to love God, which makes him to be like God.<sup>k</sup> For since God alone is the sovereign good, it is his nature to know himself and to love himself; and it is in this knowledge, and in this love, that his happiness does consist. So that it is to be like him, to be of a nature that is capable of knowing him and of loving him; and it is to partake of his happiness, to attain to the perfection of this knowledge and this love.<sup>l</sup>

<sup>f</sup> *Ecclus.* iii. 22.

<sup>g</sup> *Rev.* xxxii. 13; — *Isa.* xli. 4.

<sup>h</sup> *Psal.* xvii. 15.

<sup>i</sup> *Prov.* xvi. 4; — *Deut.* xxvi. 19; — *Isa.* xliii. 7.

<sup>j</sup> *Deut.* xxx. 20; — *John* xvii. 3.

<sup>k</sup> *Gen.* i. 26; — *Wisd. of Sol.* ii. 23; — *Ecclus.* xvii. 1; — *Coloss.* iii. 10.

<sup>l</sup> *1 John* iii. 2.

#### IV. *The Nature of Man.*

Thus we discover, by this resemblance which man has to God, what it is his nature consists in, his religion, and his first law. For his nature is nothing else but that being which is created after the image of God, and capable of possessing that sovereign good, which is to be his life and his blessedness.

#### V. *The Religion of Man.*

His religion, which is the collection of all his laws, is nothing else besides the light and the way which lead him to that life.<sup>o</sup>

#### VI. *The First Law of Man.*

And his first law, which is the spirit of his religion, is that which enjoins him to search after and to love that sovereign good; to which he ought to raise himself with all the force of his mind, and of his heart, which are made on purpose to possess it.<sup>p</sup>

#### VII. *The Second Law of Man.*

It is this first law which is the foundation and first principle of all the others. For this law, which commands man to search after and to love the sovereign good, being common to all mankind, it implies a second law, which obliges them to unity among themselves, and to the love of one another; because, being destined to be united in the possession of one only good, which is to make their common happiness, and to be united in it so straitly, that it is said that they shall be but one,<sup>q</sup> they cannot be worthy of that union in the possession of their common end, if they do not begin their union by linking themselves together by the tie of mutual love in the way that leads them to it. And there is no other law which commands every one to love himself, because no one can love himself better than by keeping the first law, and by steering the course of his life towards the fruition of that good to which it calls us.

<sup>o</sup> Prov. vi. 23.

<sup>p</sup> Matt. xxii. 38; — *Wisd. of Sol.* vi. 18.

<sup>q</sup> John xvii. 21.

### VIII. *The Foundation of the Society of Mankind on these Two Laws.*

It is by the spirit of these two laws that God, designing to unite mankind in the possession of their common end, hath begun to form among them a prior union, in the use of the means which guide them to that other union. And he has made this last union, in which their happiness is to consist, to depend on the good use of that first union, which is to form their society.

It is in order to unite them in this society, that he hath made it essential to their nature. And as we see in the nature of man his destination to the sovereign good, we shall also discover in it his destination to society, and the several ties which engage him to it from all parts; and that these ties, which are consequences of the destination of man to the exercise of the first two laws, are at the same time the foundation of the particular rules of all his duties, and the fountain of all laws.

But before we proceed any farther, to show the connection which links all the laws with these first two, it is necessary to obviate the reflection which it is natural to make on the state of this society; which, although it ought to be founded on the first two laws, does nevertheless subsist, notwithstanding the spirit of these laws has but very little influence in it; so that it seems as if it maintained itself by other principles. However, although men have violated these fundamental laws, and although society be in a state strangely different from that which ought to be raised upon these foundations, and cemented by this union; it is still true, that these divine laws, which are essential to the nature of man, remain immutable, and have never ceased to oblige men to the observance of them: and it is likewise certain, as will hereafter appear, that all the laws which govern society, even in the condition in which it is at present, are no other than consequences of these first laws. Thus, it was necessary to establish these first principles: and besides, it is not possible to comprehend aright the manner in which we see society subsist at present, without knowing the natural state in which it ought to be; and considering in it the union, which the divisions of mankind have broken, and the order which they have inverted.

• In order to judge, therefore, of the spirit and use of the laws,



which maintain society in the condition in which it is at present, it is necessary to draw a plan of this society on the foundation of the two primary laws, to the intent that we may discover in it the order of all the other laws, and the connection which they have with these first two. And then we shall see what method God hath taken to make society subsist in the state in which we see it at present, and among those persons who, not governing themselves in it according to the spirit of the fundamental laws, ruin the foundations which he had laid for it.

## CHAPTER II.

A PLAN OF SOCIETY, ON THE FOUNDATION OF THE FIRST TWO LAWS, BY TWO KINDS OF ENGAGEMENTS.

### I. *The Relation which the State of Man in this Life has to the Exercise of the First Law.*

ALTHOUGH man was made to know and to love the sovereign good, yet God did not put him immediately in possession of that end, but placed him first in this life, as the way to attain to it. And seeing man cannot move towards any objects by other steps than the light of his understanding, and the motions of his will, God hath made the clear knowledge and the unchangeable love of the sovereign good, in which the happiness of the mind and heart of man does consist, to depend on man's obedience to the law, which commands him to meditate on and to love that only good, as much as he is able in this life; which he gives him for no other end, but that he may employ it wholly in the pursuit of this object; the only one that is worthy to employ all his thoughts, and to satisfy all his desires.\*

We do not pretend to explain here the truths which religion teaches us, concerning the manner in which God directs and trains up man to this pursuit. It sufficeth for giving an idea of the plan of society, to suppose them, and to observe, that it is so much for employing man in the exercise of the first and second law, that God has given him the use of life in this world,

\* Deut. vi. 4, etc.; xl. 18.

that all things in it that present themselves to his view, both in himself and in all other creatures, are so many objects given him to engage him to it. For as to the first law, he ought to perceive by the sight and use of all these objects, that they are so many lineaments and images of that which God would have men to know, and to love in him.

*II. The Relation which the same State of Man has to the Exercise of the Second Law.*

And as to the second law, God hath so sorted and matched men among themselves, and adapted the universe to all mankind, that the same objects which ought to excite in them the love of the sovereign good, engage them likewise to society, and to a mutual love of one another. For we see nothing, and we know nothing, either without man, or within him, but what points out his destination to society.

Thus, without man, the heavens, the stars, the light, the air, are objects which present themselves to mankind, as a good common to them all, and of which every person hath the entire use. And all the things which the earth and the waters bear or bring forth, are likewise of common use; but in such a manner, that not any one of them passes to our use, but by the labor of many persons. And this renders men necessary one to another, and forms among them the different ties for the uses of agriculture, commerce, arts, sciences, and for all the other communications which the several wants of life may demand.

Thus, within man, we see that God hath formed him by an inconceivable conjunction of spirit and matter together; and that he hath created him, by the union of a soul and a body, in order to make of the said body united to the soul, and of the said divine structure of senses and members, the instrument of two uses essential to society.

The first of these two uses is, that of uniting the minds and hearts of men among themselves; which is effected by a natural consequence of the union of the soul and the body. For it is by the use of the senses united to the mind, and by the impressions of the mind upon the senses, and of the senses upon the mind, that men communicate to one another their thoughts and their sentiments. Thus, the body is at the same time the instrument and the image of that mind and of that heart, which are the image of God.

The second use of the body is, that of applying men to all the different labors which God hath rendered necessary for supplying all their wants; for it is for labor that God hath given us senses and members. And although it be true, that the labors which employ man at present are a punishment which God inflicts on him, and that God hath not given unto man a body fit for labor, to punish him by the labor itself; yet it is certain, that man is so far destined by nature for labor, that he was commanded to work even in the state of innocence.<sup>b</sup> But one of the differences between the labors of that first state of man, and these of the present, consists in this, that the labor of man, in his state of innocence, was an agreeable occupation to him, without pain, without disgust, without weariness; whereas our labor is imposed on us as a punishment.<sup>c</sup> Thus, the law which enjoins labor is equally essential both to the nature of man, and to the state to which his fall hath reduced him. And this law is also a natural consequence of the two primary laws, which, by placing man in society, engage him to labor, which is the bond of it; and appoint to every one his particular work, in order to distinguish, by the different labors, the several employments, and the different conditions, which are to compose the society.

### III. *Destination of Man to Society by Two Kinds of Engagements.*

It is thus that God, having destined mankind for society, hath formed the ties which engage him to it. And seeing the general ties which he makes among all men by their nature, and by their destination to one and the same end, under the same laws, are common to all mankind, and that they do not form in every one any singular relation which engages him to some more than to others; he adds to those general and common ties, other particular ties and engagements of several sorts, by which he unites men among themselves more closely, and determines every one to exercise effectually towards some particular persons the duties of that love which no one can exercise towards all mankind in general. So that these engagements are to every one as it were his particular laws, which point out to him what it is that the second law demands of him, and which, consequently, are

<sup>b</sup> Gen. ii. 15.

<sup>c</sup> Gen. iii. 19.

the rule of his duties. For the duties of men towards one another are nothing else but the effects of the sincere love which every man owes to another, according to the engagements under which he happens to be.

These particular engagements are of two kinds. The first is, of those which are formed by the natural ties of marriage, between husband and wife; and of birth, between parents and children. And this kind comprises likewise the engagements of kindred and affinity, which are the consequences of birth and marriage.

The second kind takes in all the other sorts of engagements, which draw all manner of persons nearer to one another, and which are formed differently, either by the several communications which pass among men of their labor, of their industry, services, and other assistances; or by those which relate to the use of things. And this comprehends all the different uses of arts, of employments, and of possessions of all kinds, and every thing else that may link persons together, according to the different wants of life; whether by free and gratuitous communications, or by commerce.

It is by all these engagements of these two kinds, that God forms the order of the society of mankind, to link them together in the exercise of the second law. And seeing he marks in every engagement what it is that he enjoins to those whom he puts under it; one perceives in the characters of the different sorts of engagements, the foundations of the several rules of that which justice and equity demand of every person, according to the conjunctures in which his particular engagements place him.

## CHAPTER III.

### OF THE FIRST KIND OF ENGAGEMENTS.

#### I. *Natural Engagements of Marriage and of Birth.*

THE engagement which marriage produces betwixt the husband and the wife, and that which birth makes between them and their children, forms a particular society in every family, in

which God links the said persons more closely together, in order to engage them to a continual practice of the several duties of mutual love. It is with this view that he has not created all men, as he did the first; but that he hath made them to be born of the union which he has formed between the two sexes in marriage, and to be put into the world into a state subject to a thousand wants, where the help of both sexes is necessary to them for a long time. And it is from the manner in which God hath formed these two ties of marriage and birth, that we must discover the foundations of the laws which relate to them.

## II. *Divine Institution of Marriage, and the several Principles of the Laws which depend on it.*

In order to form the union between man and woman, and to institute marriage, which was to be the source of the multiplication and union of mankind; and to give to the said union foundations proportionable to the characters of the love which was to be the bond of it; God created in the first place only man alone,<sup>a</sup> and then took out of him a second sex, and formed woman of one of the ribs of man,<sup>b</sup> to show, from the unity of their origin, that they make only one being; where the woman is taken out of man, and given to him by the hand of God<sup>c</sup> as a companion, and as a help meet for him,<sup>d</sup> and formed out of him.<sup>e</sup> It was in this manner, that he linked them together by this union, which is so strict, and so holy, and of which it is said, that it is God himself who hath joined them together,<sup>f</sup> and who has made them two to be one flesh.<sup>g</sup> He made man the head of this entire being;<sup>h</sup> and he established their union, by forbidding them to separate what he himself had joined.<sup>i</sup>

It is these mysterious ways by which God hath formed the engagement of marriage, which are the foundations, not only of the laws which regulate all the duties of the husband and of the wife, but also of the laws of the Church, and of the civil laws which concern marriage, and of the matters which depend on it, or which have any relation to it.

<sup>a</sup> Gen. ii. 7.

<sup>b</sup> Gen. ii. 21, 22.

<sup>c</sup> Gen. ii. 22.

<sup>d</sup> Gen. ii. 18.

<sup>e</sup> Gen. ii. 23.

<sup>f</sup> Matt. xix. 6.

<sup>g</sup> Gen. ii. 24; — Matt. xix. 6; — Ephes. v. 31; — Mark x. 8.

<sup>h</sup> 1 Cor. xi. 3; — Ephes. v. 22, 23; — Gen. iii. 16; — 1 Cor. xiv. 34.

<sup>i</sup> Matt. xix. 6.

Thus, marriage being a tie formed by the hand of God, it ought to be celebrated in a manner becoming the holiness of the divine institution which hath established it. And it is a natural consequence of this divine order, that the marriage be preceded and accompanied by decency, by the reciprocal choice of the persons who engage in it, by the consent of parents, who are in many respects in the place of God; and that it be celebrated by the ministry of the Church, where this union ought to receive the divine benediction.

Thus, the husband and wife being given the one to the other by the hand of God, who unites them in one complete being, that cannot be separated; a marriage which has been once lawfully contracted, can never be dissolved.<sup>1</sup>

Thus, this union of persons in marriage is the foundation of civil society, which unites them in the use of their goods and of all other things.

Thus, the husband being, by divine appointment, the head of the wife, he has over her a power proportionable to the rank he has in their union. And this power is the foundation of the authority which the civil laws give to the husband, and of the effects of this authority in the matters where it hath its use.

Thus, marriage being instituted for the multiplying of mankind, by the union of the husband and wife, linked together in the manner in which God unites them; all manner of conjunction besides that of marriage is unlawful, and cannot give other than an illegitimate birth. And this truth is the foundation of the laws of religion, and of civil government, against unlawful conjunctions; and of the laws which regulate the state of children which issue from such unlawful conjunctions.

The tie of marriage, which unites the two sexes, is followed by that of birth, which unites to the husband and wife the children which are born of their marriage.

### III. *The Tie of Birth and Principles of the Laws which are the Consequences of it.*

It is in order to form this tie, that God hath established that man should receive his life from his parents, in the bosom of a mother; that his birth should be the fruit of the pains and labors of the said mother; that he should be born in-

<sup>1</sup> Matt. xix. 9.

capable of preserving this life into which he enters; that he should continue in it a long time in a state of weakness, and stand in need of the help of his parents, in order to his subsisting, and being educated in it. And as it is by this birth that God forms the mutual love, which so strictly unites him, who, by begetting his own likeness gives him life, with him who receives it; so he gives to the love of parents a character suited to the condition of children in their birth, and to all the wants which are the consequences of this life which they have given them; that he may engage them, by the said love, to the duties of education, instruction, and all the other paternal duties. And he gives to the love of children a character suited to the duties of dependence, obedience, gratitude, and all the other filial duties, to which they are engaged by the benefit of life, which they hold in such a manner of their parents, of whom God makes them to be born, that he teaches us, that without them they would not have that life." \* And this obliges them to render to their parents all manner of assistance, and all manner of service in their wants; and especially in those of old age, and other weaknesses, infirmities, and necessities, which afford children an occasion of paying to their parents duties which answer the first benefits which they received from them.

It is this order of birth, which, by forming the engagements between parents and children, is the foundation of all their duties, the extent whereof it is easy to discover by the characters of these different engagements. And on these very principles depends all that the civil laws have regulated touching the effects of the paternal power, and of the mutual duties of parents towards children, and of children towards parents; according as they are matters that are subject to the regulation of policy, such as the rights which the laws and customs give to fathers for the government of their children, for the celebration of their marriages, for the administration and enjoyment of their estates, or which relate to the disobedience of children to their parents, or to the injustice of parents, or of children, who refuse support to one another, and other matters of the like nature.

It is likewise upon this order, which God has made use of for giving life to children by their parents, that the laws are founded which convey to children the estates of their parents after death;

for temporal goods being given to men for all the different necessities of life, and being only a consequence of that benefit; it is agreeable to the order of nature, that, after the death of the parents, the children should inherit their goods, as an accessory to the life which they have received from them.

The tie of birth, which unites fathers and mothers to their children, unites them likewise to those who are born and descended of their children. And this tie makes all the descendants to be considered as children, and all the ascendants as being in the rank of fathers or mothers.

It may be remarked on the difference of the characters of the love which unites the husband and the wife, and of that which unites parents and children, that it is the opposition of these different characters, which is the foundation of the laws which prohibit marriage between ascendants and descendants in all degrees, and between collateral in some degrees. And it is easy to perceive the reasons of such prohibition, by barely reflecting on what has been just now remarked in reference to these characters, on which it is not necessary to enlarge here.

#### IV. *The Ties of Kindred and Affinity, and their Principles.*

Marriage and birth, which unite so strictly the husband and wife, parents and children, form also two other sorts of natural ties, which are consequences of them. The first is, that of collateral relations, which is called kindred; and the second is, that of allies by marriage, which is called alliance, or affinity.

Kindred unites the collateral relations, who are those persons whose birth hath its origin from one and the same common ascendant. They are called collaterals, because, whereas the ascendants and descendants are in a direct line from father to son, the collaterals have every one their own line, which terminates in that of the common ascendant. Thus they are at the side of one another; and the foundation of their tie and kindred is, their common union to the same parents, from whom they derive their birth.

This is not the proper place to explain the degrees of kindred; it is a matter which makes a part of that of successions. And it sufficeth to remark here, that this union of kindred is the foundation of several laws; such as those which forbid marriage between persons who are near of kin; those which call them to successions, and to guardianships; those of the challenges of



judges, and exceptions against witnesses, who are relations to the parties, and others of the like nature.

Affinity is the tie and relation which is made between the husband and all the kindred of the wife; and between the wife and all the kindred of the husband. The foundation of this tie is the strict union between the husband and the wife, which makes that those who are tied by kindred to one of the two, are of consequence tied to the other: and this affinity makes the husband consider the father and mother of his wife as being in the place of father and mother to himself: and her brothers, her sisters, and her other relations, as being to him in the stead of brothers, sisters, and relations: and the wife looks in the same manner upon the father and mother, and all the kindred of her husband, as having the same relation to herself.

This relation of affinity is the foundation of those laws which forbid marriage between persons that are allied in a direct line of ascendants and descendants, in all degrees; and between collateral allies, within the compass of certain degrees: and likewise of the laws which call allies to tutorships, of those which reject judges and witnesses who are allied to the parties, and of others of the like nature.

## CHAPTER IV.

### OF THE SECOND KIND OF ENGAGEMENTS.

*I. What these Engagements are, and how God puts every one under those that are peculiar to him.*

SEEING the engagements of marriage and birth, of kindred and affinity, are limited to certain persons, and that God hath placed mankind in society, there to unite them by mutual love, in such a manner that every person may be disposed to produce towards others the effects of this love, according as occasion may oblige him to it; he hath made necessary in society a second kind of engagements, which approach and link differently together all manner of persons, and frequently even those who are the greatest strangers to one another.

It is to form this second sort of engagements, that God multiplies the wants of men; and that he makes them necessary to one another for getting all these wants supplied. And he makes use of two ways to place every one in the order of the engagements for which he designs him.

The first of these two ways is the ranging of persons in society, where he assigns to every one his place, that he may point out to him by the situation of it the relations which tie him to others, and the duties that are peculiar to the rank which he holds; and he places every one in his proper rank, by his birth, by his education, by his inclinations, and by the other effects of his conduct, which range and dispose men in their places. It is this first way, which produces to all men the general engagements arising from their conditions, their professions, their employments, and which places every person in a certain condition of life, of which his particular engagements are to be the consequences.

The second way is the ordering of the events and conjunctures, which determine every one to particular engagements, according to the occasions and circumstances in which he happens to be.

## II. *These Engagements are of Two Sorts; those which are Voluntary, and those which do not depend on the Will.*

All these sorts of engagements of this kind are either voluntary, or involuntary. For seeing man is a free agent, there are engagements into which he enters willingly: and seeing he has a dependence on the Divine Providence, there are some engagements under which God puts him without his own free choice. But whether the engagements depend on the will, or be altogether independent on it as to their origin, man acts freely both in the one and the other: and his whole conduct implies always these two characters; one, of his dependence upon God, whose order he ought always to obey; and the other, of his liberty, which ought to move him to it. So that all these sorts of engagements are proportioned both to the nature of man, and to his condition in this state of life.

## III. *Voluntary Engagements.*

Voluntary engagements are of two sorts. Some are formed mutually between two or more persons, who bind and engage

themselves reciprocally to one another by their free will: and others are formed by the will of one of the parties alone, who engages himself to other persons, when the said persons do not treat with him.

It will be easy to distinguish these two sorts of engagements by some examples. Thus, for voluntary and mutual engagements, we see that because of the several occasions which men have to communicate to one another their industry and their labor, and for carrying on the different commerces of all things, they enter into partnership, they let and hire, they buy and sell, they barter, and make with one another all sorts of covenants.

Thus, as to the engagements which are formed by the will of one party alone, we see that he who becomes heir or executor obliges himself to the creditors of the succession; that he who takes upon himself the management of the affair of an absent person, without his knowledge, obliges himself for the consequences of the affair which he has begun; and in general, that all those who voluntarily enter upon employments oblige themselves to the engagements which are the consequences of them.

#### IV. *Engagements independent on the Will.*

The involuntary engagements are those under which God puts men without their own choice. Thus, those who are named to the offices which are called municipal, such as those of mayor, sheriff, consul, and others of the like nature, and those who are engaged in some commissions of justice, are obliged to execute them, and cannot avoid doing it, unless they have reasonable excuses. Thus, he who is assigned guardian to an infant is obliged, independently of his will, to be instead of the father to the orphan who is committed to his charge. Thus, he whose affair hath been managed in his absence, and without his knowledge, by a friend, who hath taken care of it, is under an obligation to that friend, to reimburse him for what he has reasonably expended, and to ratify what he has well transacted. Thus, he whose goods have been saved in a shipwreck by lightening the vessel, and throwing other goods overboard, is obliged to bear his share of the loss of the goods thrown into the sea, in proportion to the value of what has been saved for his use. Thus, the condition of those who are members of the society, and are destitute of the means of subsistence, and unable to work for their

•livelihood, lays an obligation on all their fellow-members to exercise towards them mutual love, by imparting to them a share of those goods which they have a right to. For every man, being a member of the society, has a right to live in it; and that which is necessary to those who have nothing, and who are not able to gain their livelihood, is by consequence in the hands of the other members; from whence it follows, that they cannot without injustice detain it from them. And it is because of this engagement, that in public necessities private persons are obliged, even by constraint, to assist the poor according to their wants. Thus, the condition of those who suffer any injustice, and who are under oppression, is an engagement to those who have in their hands the ministry and authority of justice, to employ it for their protection.

#### V. *The Spirit of the Second Law in all Engagements.*

We see in all these sorts of engagements, and in all the others which we can imagine, that God forms them, and puts men under them, merely to employ them in the exercise of mutual love; and that all the different duties prescribed by engagements are nothing else but the several effects which this love ought to produce, according to the conjunctures and the circumstances. Thus, in general, the rules which command us to render to every man what is his due, to wrong no man, to be always faithful and sincere, and others of the like nature, enjoin only effects of mutual love. For to love is to wish well, and to do good; and no man loves those whom he injures, nor those to whom he is unfaithful and unsincere. Thus, in particular, the rules which ordain the tutor to take care of the person and estate of the minor who is committed to his charge, command him only the effects of that love which he ought to have for this orphan. Thus, the rules of the duties of those who are in offices, and in all other sorts of engagements, general or particular, prescribe unto them nothing but what the second law demands, as it is easy to perceive in all the particular engagements. And it is so true, that it is the commandment of loving which is the principle of all the rules of engagements, and that the spirit of these rules is nothing else but the order of that love, which we owe reciprocally to one another, that if it happens that one cannot, for example, restore to another what he has of his, without breaking in upon this

order, the duty is suspended until it may be performed according to this spirit. Thus, he who has the sword of a madman, or of any other person, who demands it in a transport of passion, ought not to restore it to him, until he be in a condition not to make a bad use of it; for it would not be love to him, to give him his sword in these circumstances.

It is after this manner, that the second law commands men to love one another. For the intent of this law is not to oblige every one to have for all other persons that inclination which is produced by the qualities which render an object amiable; but the love which it commands consists in wishing to others their true good, and in procuring it for them, as much as is in our power. And it is for this reason, that, seeing this command is independent on the merit of those we ought to love, and that it excepts nobody, it obliges us to love those who are the least amiable, and even those who hate us. For the law which they transgress is nevertheless binding on us, and we ought to wish their true good, and to procure it, as much out of hopes of reclaiming them to their duty, as out of fear of transgressing our own.

We have here made these reflections, to show that, seeing it is the second law which is the principle and spirit of all those laws relating to engagements, it is not enough to know, as the most barbarous people do, that we ought to render to every one his due, that we ought to wrong no man, that we ought to be sincere and faithful, and the other rules of the like nature; but it is necessary, moreover, to consider the spirit of these rules, and the source of their truth in the second law, to give to them all the extent which they ought to have. For we see often, that, for want of this principle, many judges who consider these rules only as politic laws, without penetrating into the spirit of them, which obliges to a more abundant justice, do not give them their just extent, and tolerate infidelities and injustices which they would suppress, if the spirit of the second law were the principle by which they acted.

#### VI. *The Order of Government for keeping Men within their Engagements.*

We must add to these remarks on what concerns engage-

<sup>b</sup> *Levit. xix. 17, 18; — Exod. xxiii. 4, 5; — Psal. vii. 4; — Prov. xxv. 21; — Rom. xii. 20; — Matt. v. 24.*

ments, that they demand the use of a government, to restrain every one within the order of those that are peculiar to him. It is for this government that God hath established the authority of the powers that are necessary to maintain society, as will appear in the tenth chapter. And we shall only remark here, on the subject of government and in relation to engagements, that there are many engagements which are formed by this order of government, as between princes and subjects, between those who are placed in dignities and public offices, and private persons, and likewise others which belong to this order.

VII. *The Engagements are the Foundations of the particular Laws which relate to them.*

It was necessary to give this general idea of all these several sorts of engagements of which mention has been made hitherto. For since it is by these ties that God engages men to all the different duties, and that he hath put into each engagement the foundations of the duties which depend on it, it is in these sources that we ought to find the principles and the spirit of the laws, according to the engagements to which they have relation. We have seen, in the engagements of marriage and birth, the principles of the laws which relate to them; and we must discover in the other engagements, which have been just now explained, the principles of the laws which are peculiar to them.

We shall confine ourselves to such as relate to the civil laws; and seeing the greatest part of the matters treated of in the civil law are consequences of the engagements that have been spoken of in this chapter, we shall explain in the following chapter some general rules which flow from the nature of these engagements, and which are at the same time the principles of the particular rules concerning the matters which arise from the said engagements.

## CHAPTER V.

OF SOME GENERAL RULES WHICH ARISE FROM THE ENGAGEMENTS THAT HAVE BEEN MENTIONED IN THE PRECEDING CHAPTER, AND WHICH ARE SO MANY PRINCIPLES OF THE CIVIL LAW.

THE general rules which we have just now mentioned, and which are gathered from all that hath been said in the preceding chapter, and also in the others, are these which follow; and which we shall explain in so many articles, as consequences of the principles which have been laid down. It follows, then, from these principles, —

I. 1st Rule. — *Engagements are instead of Laws.*

That every man being a member of the body of the society, every one ought to discharge in it his duties and his functions, according as he is determined to them by the rank which he holds in it, and by his other engagements. From whence it follows, that the engagements of every person are to him, as it were, his proper laws.

II. 2d Rule. — *Submission to the Powers.*

That each particular person being linked to this body of the society of which he is a member, he ought to undertake nothing that may disturb the order of it. And this implies the engagement of submission, and obedience to the powers which God hath established for maintaining this order.\*

III. 3d Rule. — *To do Nothing in his particular Station that may disturb the Public Order.*

That the engagement of each particular person, as to what concerns the order of the society of which he is a part, obliges him not only to do nothing with respect to others which may violate this order, but obliges him likewise to contain himself within his rank, in such a manner as that he make no bad use either of himself, or of that which belongs to him. For he is in the society, what a member is in the body.

\* Rom. xiii. 1; — Tit. iii. 1; — 1 Pet. ii. 13; — Wisd. of Sol. vi. 4.

Thus, those who, without doing injury to others, fall into some disorder which gives offence to the public, whether in their persons, or as to their goods, as those do who fall into despair, those who blaspheme, or who swear, those who squander away their estates, and, in a word, all those who offend against good manners, modesty, or decency, in such a manner as to violate the external order of behaviour, are justly punished by the civil laws, according to the quality of the disorder.

IV. *4th Rule.*— *To do Wrong to no Man, and to give every one his Due.*

That in all the engagements of one person to another, whether voluntary or involuntary, which may be the subject-matter of civil laws, they owe reciprocally to one another that which is required by the two precepts included in the second law: one, to do to others what they should do to us; and the other, not to do to any-body what we would not have others do to us. And this comprehends the rule of doing wrong to no man, and that of rendering to every one his due.

V. *5th Rule.*— *Sincerity and Honesty in Voluntary and Mutual Engagements.*

That, in voluntary and mutual engagements, those who treat together owe to one another sincerity in explaining reciprocally what it is that they engage themselves to, fidelity in the execution of it, and every thing which the consequences of the engagements into which they are entered may demand. Thus the seller ought to declare sincerely the qualities of the thing which he sells, he ought to take care of it until he delivers it, and he ought to warrant it after he has delivered it.

VI. *6th Rule.*— *Fidelity in what Involuntary Engagements demand.*

That, in involuntary engagements, the obligation is proportioned to the nature and consequences of the engagement,

<sup>b</sup> *Eccles.* xi. 21; — *1 Cor.* xiv. 40; — *l.* 10, § 1, *D. de just. et jure*; — § 2, *Instit. de his qui sui vel al. juris sunt.*

<sup>c</sup> *Matth.* vii. 12; — *Luke* vi. 31.

<sup>d</sup> *Thib.* iv. 15.

<sup>e</sup> *L.* 10, § 1, *D. de just. et jure*; — § 3, *Instit. eod.*

<sup>f</sup> *Phil.* i. 10; — *Prov.* xii. 22; — *Eccles.* xxix. 3.

<sup>g</sup> *L.* 2, § ult., *D. de obl. et act.*



whether it consists in doing, or giving, or in any other sort of obligation.<sup>a</sup> Thus, the tutor is obliged to govern the person, and to administer the goods, of the orphan who is under his care, and to do every thing which the said government and administration may render necessary. Thus, he who is called to a public office, although it be against his will, ought to execute it. Thus, those who without any agreement happen to have any thing in common together, such as co-heirs and others, owe reciprocally to one another what their engagements may require.

**VII. 7th Rule.** — *All Deceit unlawful, in all Sorts of Engagements.*

That in all sorts of engagements, whether voluntary or involuntary, it is forbidden to use any infidelity, double dealing, deceit, knavery, and all other ways of doing hurt and wrong.<sup>1</sup>

**VIII. 8th Rule.** — *Engagements where Justice can constrain the Parties.*

That, seeing all the particular persons compose together the society, whatever respects the order of it lays an engagement on every one of them to do what the said order demands of him; and if he does not do it willingly, he may be compelled to it by the authority of justice. Thus, when persons are named to public offices in towns and other places, such as those of mayor, sheriff, and other offices or commissions of the like nature, they are compelled to execute them.<sup>1</sup> Thus, by the Roman law, those who were assigned to be tutors were forced to accept the tutorship, and to act in it.<sup>2</sup> Thus, particular persons are constrained to sell what they chance to have that is necessary for some public use.<sup>3</sup> Thus, it is just to oblige private persons to pay taxes and imposts for defraying the public charge.<sup>4</sup>

**IX. 9th Rule.** — *Liberty of all Sorts of Covenants.*

That, since voluntary engagements between private persons

<sup>a</sup> L. 3, D. de obl. et act.

<sup>1</sup> L. 21, D. ad municip.

<sup>2</sup> Vid. l. 11, D. de evict. in verb.: Possessiones ex præcepto principali distractas;

— V. l. 12, D. de vig. — See the Ordinance of Philip the Fair, in 1303.

<sup>4</sup> Mart. xxii. 21; — Rom. xiii. 7.

<sup>1</sup> 1 Thess. iv. 6; — l. 1, § 1, D. de dolo.

<sup>2</sup> L. 1, D. de admin. et per tut.

ought to be proportioned to the different wants which render the use of them necessary, it is free for all persons who are capable of engagements, to bind themselves by all manner of covenants, as they think fit, and to diversify them according to the differences of affairs of all kinds, and according to the infinite variety of combinations that arise in affairs from the conjunctures and the circumstances.<sup>p</sup> Provided only that the agreement have nothing in it contrary to the rule which follows.

**X. 10th Rule.** — *All Engagements contrary to Law or Good Manners are unlawful.*

That all engagements are lawful only in so far as they are conformable to the order of society; and that those which are contrary to it are unlawful, and punishable according to the degree of their opposition. Thus, employments which are contrary to this order are criminal engagements. Thus, promises and covenants which violate the laws, or good manners, oblige the parties to nothing, except to the penalties which the misdemeanour may deserve.<sup>q</sup>

We shall see, in the several matters treated of in the civil laws, what is the use of all these principles; and it sufficeth to take notice of them here, as being general rules, on which depend an infinite number of particular rules in this whole detail of matters.

**XI. Transition to the following Chapter.**

We did not think proper to mix among the engagements which have been mentioned hitherto, another kind of tie, which unites men more closely together than any one of all the engagements, except it be those of marriage and birth. It is the tie of friendship, which produces in society an infinite number of good effects, both by the good offices and services which friends render one to another, and by the assistance which every one receives from the persons who are allied to his friends. But although friendships make a chain of ties and relations of a large extent, and of great use in society, yet it was not proper to mix friendships with engagements, because they are of a nature which is distinguished from them by two charac-

<sup>p</sup> L. 1, *D. de pact.*; — L. 7, § 7, *D. de pact.*

<sup>q</sup> L. 6, *Cod. de pact.* — See *Mass. xiv.*

ters: one, that there is no friendship in which love is not reciprocal; whereas, in engagements, love, which ought to be mutual in them, is not always so: and the other, that friendships do not make a particular kind of engagement, but are consequences which arise from engagements. Thus, the ties of kindred, of affinity, of offices, of commerce, of business, and others, are the occasions and causes of friendships; and they presuppose always some other engagement, which brings those persons together who become friends.

It is this use of friendships, which is so natural and so necessary in society, that does not allow us to pass them quite over in silence. And it is this difference between their nature and that of engagements, which hath obliged us to distinguish them, and therefore we have made them the subject of the following chapter.

## CHAPTER VI.

### OF THE NATURE OF FRIENDSHIPS, AND THEIR USE IN SOCIETY.

#### I. *The Nature of Friendships, and their Kinds.*

FRIENDSHIP is a union that is formed between two persons, by the reciprocal love which the one bears towards the other. And as there are two principles of love, so there are two kinds of friendships. One is of those friendships which have for their principle the spirit of the first laws. And the other is of all those which, not being founded on that principle, can have none other, besides that of self-love. For if friendship wants that attractive quality which directs the union of friends to the search after the sovereign good, it can have no other view than a servile desire of riches, which no one can set his affections on but out of a principle of self-love. Thus, those who, without the love of the sovereign good, seem to love their friends, only for the esteem they have of their merit, or out of a desire of doing them good, and even those who bestow their wealth, yea, even their life, on their friends, find in these effects of their friendship, either some praise, or some pleasure, or some other charm, in which they place their own peculiar good, and which is al-

ways mixed with that benefit which their friends receive from them. Whereas those who love one another, by the spirit of their union in the sovereign good, do not regard their own proper good, but the common good of both, and a good whereof the nature is in this different from that of all other goods, that no one can have it to himself alone, unless he desire it likewise for others, and unless he do sincerely all that is in his power to help them to attain to it. Thus, those who are united to their friends by this tie do really and in earnest seek for the good and advantage of those whom they love; and seeing they despise all other good, besides this alone, which they love solely and with all their heart, they are much more disposed to give their estates, and their lives, for their friends, if there be occasion for it, than those persons can be who love only out of a principle of self-love.

This distinction between friendships which are contracted out of a spirit of the first law, and those which are made only out of self-love, is not so exact as that it may be said that every friendship is either entirely of the one, or entirely of the other of these two kinds. For in the small number of those in which is found the spirit of the primary laws, there are few of them so perfect, as to be altogether free from self-love; and we see some friendships, where one of the friends contributes on his part only self-love, although the other be moved by another spirit. And all these sorts of friendships are adapted to the present state of society, according to the different dispositions of the persons whom they link together.

## II. *Difference between Friendship and the Love enjoined by the Second Law.*

It is easy to judge by this account of the nature of friendship, that, since it is a reciprocal tie between two persons, there is a great deal of difference betwixt friendship and the love which is enjoined by the second law. For the duty of that love is independent on the reciprocal love of the person whom we are commanded to love: and, although on his part he do not love us, and if he even hate us, yet the law will have us to love him: but because friendship cannot be formed but by a reciprocal love, it is not enjoined to any person in particular. For what depends on two persons cannot be the subject of a command to one of the two alone: and besides, seeing friendship cannot

be formed but by the charm which every one of the friends finds in his friend, nobody is obliged to contract a friendship where that charm is not found. And likewise we see no friendship but what hath for its foundation the qualities which friends search for in one another; and which is kept up only by the good offices, the services, the benefits and other advantages which make in each friend the merit which attracts and nourishes the esteem and love of the other.

It is because of this necessary correspondence between friends, that friendships are contracted only between persons who, happening to be joined together in some engagements which draw them nearer to one another, chance to have dispositions proper for uniting them; such as the equality of conditions, a conformity of age, of manners, of inclinations and sentiments, a reciprocal disposition to love and serve one another, and others of the like nature. And we see, on the contrary, that friendships are contracted and kept up with difficulty, and but very rarely, between persons whom their conditions, their age, and the other qualities distinguish in such a manner, that the natural state of friendship is not to be found in them, for want of the correspondences, and of the liberty which friends ought to take with one another.

### III. *The Command of the Second Law leads Men to Friendship.*

But although it be true, that friendships are not commanded to any one in particular, yet they are nevertheless a natural consequence of the second law. For that law commanding every one to love his neighbour, it includes the command of mutual love. And when the particular engagements link persons together who are animated by the spirit of that law, there is formed immediately between them a union proportioned to the reciprocal duties of the engagements which they are under. And if each of them finds in the other qualities proper to unite them more closely together, their union becomes a friendship.

### IV. *Two Characters of Friendship; that it is Mutual, and that it is Free.—The Consequences of those Characters.*

It appears from these remarks on the nature of friendships,

that they have two essential characters; one, that they ought to be reciprocal; and the other, that they ought to be free. They are reciprocal, seeing they cannot be formed but by the mutual love of two persons: and they are free, because one is not obliged to tie himself to those who have not the qualities that are proper to form a friendship.

It follows from these two characters of friendships, that, seeing they ought to be reciprocal and free, a man is always at liberty not to engage in friendships, and that he ought even to shun those which may be attended with bad consequences. And it follows also, that the most solid and the strictest friendships may be weakened and destroyed, if the conduct of one of the friends gives occasion to it. And not only are coldnesses and ruptures in friendships not unlawful; but sometimes they are even necessary, and consequently just, with respect to that friend who on his part fails in any duty. Thus, when one of the friends violates the friendship either by some act of infidelity, or by failing in some essential duties, or by requiring things that are unjust; it is free for the other not to look upon him any more as a friend, who hath in reality ceased to be so; and according to the causes of the coldness and rupture, one may either break off the friendship altogether, or dissolve it without an open rupture; provided only, that he who has a just provocation given him by his friend do not on his part give any cause of disgust, and that in this change he preserve still, instead of friendship, that other kind of love which nothing can dispense with.

#### V. *Difference between Friendship and Conjugal Love.*

All these characters of friendship, which it is free for one to contract, and free for him to break, and which subsists only by the mutual correspondence of the two friends, show plainly that we cannot give the name of friendship to that love which unites the husband and the wife, nor to that which ties parents to their children, and children to their parents. For these ties form a love of another nature, very far different from that which makes friendship, and which is much stronger. And although it be true, that the husband and the wife make choice of one another, and engage freely in marriage; yet their union being once formed, it becomes necessary, and they cannot dissolve it.

## VI. *Difference between Friendship, and the Love of Parents and Children.*

We see likewise what are the differences which distinguish friendship from the love of parents towards their children, and of children towards their parents. For besides that this love is not reciprocal whilst the children remain incapable of loving, there are other characters which demonstrate plainly enough, that it is of a nature altogether different from that of friendships. And although there be no choice of persons in this love, yet it hath other foundations, much more solid than the firmest and strictest friendships.

What has been just now remarked touching the distinctions between friendships, and the love that is formed by the ties of marriage and of birth, does not extend to the love of brothers, and other relations. For although nature forms a tie between them without their own choice, which obliges them naturally to the mutual love of one another; yet this engagement is not attended with friendship, except when they find in one another qualities whereupon to ground it. But when proximity of blood happens to be accompanied with the other qualities which make friends, the friendships of brothers, and of other near relations, are much firmer than those of other persons.

## VII. *Use of Friendships in Society.*

It appears, by these few general remarks on friendships, what their nature is, and what the principles are which depend on them; but seeing this is not a matter treated of in the civil laws, it is not proper to enter upon the detail of the particular rules of the duties of friends; it sufficeth to have observed on the matter of friendships so much thereof as has any relation to the order of society. And we see that, as friendships arise from the several ties which bring men together, so they are at the same time the sources of an infinite number of good offices and services, which keep up those very ties, and which contribute a thousand ways to the order and uses of society, both by the union of friends among themselves, and by the advantages which each person may find in the ties which are between his friends and other persons.

## VIII. *Transition to the following Chapters.*

To finish the plan of society, it remains that we give an idea of successions which perpetuate it, and also an idea of the troubles which disturb its order: and we shall see afterwards in what manner it is that God makes it to subsist in the present state.

## CHAPTER VII.

### OF SUCCESSIONS.

WE do not speak of successions here, with an intention to give the whole detail of that matter in this place; but only to give a view of it in the plan of society, where it ought to be distinguished, because successions make a great part of that which passes in society, and are one of the matters which the Roman laws treat of most copiously.

#### • I. *The Necessity of Successions, and their Use.*

The order of successions is founded on the necessity of continuing and transmitting the state of society from the passing generation, to that which follows; and this is done insensibly, by making certain persons to succeed in the place of those who die, that they may enter upon their rights, their offices, and their relations and engagements, which are capable of passing to posterity.

#### • II. *Two Ways of Succeeding.*

This is not the proper place to explain the different ways of succeeding, whether by the order of nature, and the disposition of the laws, which call to successions the descendants, the ascendants, and other relations; or by the will of those who die, and who name their heirs or executors. We shall see, in the plan of the matters of law, the distinction of these ways of succeeding, and the order of the particular matters which concern successions.

#### • IPI. *Successions are to be distinguished from Engagements.*

We shall only observe here, that successions are to be distin-



guished from engagements, which have been the subject of the foregoing chapters. For although successions make an engagement, into which those persons who succeed to others enter, and which obliges them to bear their burdens, to pay their debts, and to other consequences; yet it is not under the idea of engagements that we are to consider successions; but they ought to be considered under the view of the change which makes the goods, the rights, the burdens, the engagements, of those who die to pass to their successors. And this includes so great a variety of particular matters, that they shall make one of the two parts of the book of *The Civil Law in its Natural Order*.

## CHAPTER VIII.

### OF THREE SORTS OF TROUBLES WHICH DISTURB THE ORDER OF SOCIETY.

#### I. *Troubles which disturb the Order of Society.*

WE see in society three sorts of troubles, which disturb the order of it; lawsuits, crimes, and wars.

#### II. *Lawsuits.*

Lawsuits are of two sorts, according to the two ways in which men fall out among themselves, and encroach one upon another: those which respect mere interest only, which are called *civil causes*; and those which are consequences of quarrels, such as offences, crimes; and these are termed *criminal causes*. It sufficeth to observe here, in general, that all sorts of lawsuits are one of the matters which come under the direction of the civil laws, which prescribe the manner in which suits are to be begun, carried on, and ended: which is called the order of judicial proceedings.

#### III. *Crimes and Offences.*

Crimes and offences are infinite, according as they respect either the honor, the person, or the estate. And the punishment of crimes is likewise a matter treated of in the civil laws, which have made provision to suppress them by three several ways. One, by correcting those that are

guilty; the second, by repairing as much as is possible the evil which they have done; and the third, by restraining the wicked by the example of punishments. And it is by these three views, that the laws have proportioned the punishments to the crimes, and to the several offences.

#### IV. Wars.

Wars are an ordinary consequence of the differences which fall out between the sovereigns of two nations, who being independent on one another, and having no common judge, do themselves justice, by the force of arms, when they cannot or will not have mediators to make peace between them; for they take in that case for laws, and for decisions of their differences, the events which God gives to wars. There is likewise another sort of wars, which are only a bare effect of violence, and of the attempts made by a prince, or a state, upon their neighbours. And lastly, there are some wars which are nothing but rebellions of subjects, who revolt against their prince.

Wars have their peculiar laws in the law of nations; and there are consequences of wars which are decided by the civil law.

#### V. Transition to the following Chapter.

There remains only, for finishing the plan of society, to consider how it subsists in the present state, where the spirit of the primary laws, which ought to be the only cement of it, is so little regarded.

### CHAPTER IX.

OF THE STATE OF SOCIETY AFTER THE FALL OF MAN, AND HOW GOD MAKES IT TO SUBSIST.

*I. All the Disorders in Society have been a Consequence of Man's Disobedience to the First Law.*

WHATEVER we see in society that is contrary to order is a natural consequence of the disobedience of man to the first law, which commands him to love God. For this law being

the foundation of the second, which enjoins men to love one another, man could not violate the first of these two laws, without falling at the same time into a state which hath carried him to a breach also of the second law, and consequently to disturb the order of society.

The first law was to unite men in the possession of the sovereign good: and they found in that good two perfections which were to make their common happiness: one, that it is capable of being possessed by all persons; and the other, that it may be the entire happiness of every one in particular. But man having transgressed the first law, and having gone astray from the true happiness, which he could find nowhere but in God alone, he hath sought after it among sensible goods, in which he found two defects opposite to these two characters of the sovereign good: one, that these goods cannot be possessed by all; and the other, that they cannot make the happiness of any one. And it is a natural effect of the love and pursuit of the goods which have these two defects, that they create divisions among those who set their hearts upon them. For seeing the capacity of the mind and heart of man, which is formed for the enjoyment of an infinite good, cannot be satisfied with these finite goods, which cannot belong to many, nor are they sufficient to make any one man happy; it is a consequence of this state into which man has brought himself, that those who place their happiness in the possession of goods of this kind, happening to meet together in the pursuit of the same objects, fall out among themselves, and break through all sorts of ties and engagements, according to the contrary engagements which they are led into by the love of that good which they seek after.

## II. *A disorderly Love the Source of Disorders in Society.*

It is in this manner that man, having substituted other goods in the place of God, who ought to be his only good, and his only happiness, has made of these apparent goods his sovereign good, on which he has placed his love, and on which he founds his happiness, which is in effect to make them his god.<sup>a</sup> And it is thus by departing from this only true good, which ought to unite men, that their going astray in the pursuit of other goods has divided them.<sup>b</sup>

<sup>a</sup> *Wisd. of Sol.* xiii. 3.

<sup>b</sup> *James* i. 2.

It is therefore the disorder of love that hath disordered the society; instead of that mutual love, the character of which is to unite men in the pursuit of their common good, we see another love quite opposite to it prevail, whose character hath justly given it the name of self-love; because he in whom this love reigns, seeks only after those goods which he makes entirely his own, and which he loves in others only in so far as he can draw advantage out of them to himself.

It is the poison of this love which benumbs the heart of man, and makes it heavy; and which, by depriving those whom it possesses of the view and love of their true good, and by confining all their views and all their desires to the particular good to which it engages them, is, as it were, a universal plague, and the source of all the evils that infest society. So that it would seem that, since self-love undermines the foundations of society, it ought to destroy it; and this leads us to inquire in what manner it is that God supports society in the deluge of evils which are produced in it by self-love.

### III. *Of Self-Love, which is the Bane of Society, God hath made a Remedy to contribute towards its Subsistence.*

We know that God hath permitted evil to happen in the world, only because he foresaw that by his almighty power and infinite wisdom he should be able to draw good out of it, and a much greater good than a pure state of good things would have been, without any mixture of evil. Religion teaches us the infinite good which God hath drawn out of so great an evil as the state to which sin hath reduced mankind: and that the incomprehensible remedy which God has made use of to draw him out of it, hath raised him to a state of greater happiness than that which he enjoyed before his fall. But whereas God hath made this change for a good cause, and which proceeds only from himself, we see in his government of society, that from so bad a cause as our self-love, and from a poison so contrary to mutual love, which ought to be the foundation of society, God hath made use of it as one of the remedies for preserving it in being. For it is of this principle of division that he hath made a tie which unites men together in a thousand manners, and which supports the greatest part of engagements. One may be able to judge of this use of self-love in society, and of the relation which such

a cause hath to such an effect, by the reflections which it will be easy to make on the following remark.

The fall of man not having freed him from his wants, and having on the contrary multiplied them, it hath also augmented the necessity of labor and of commerce, and at the same time the necessity of engagements, and of ties; for no man being sufficient of himself to procure the necessaries and conveniences of life, the diversity of wants engages men in an infinite number of ties, without which they could not live.

This state of mankind induces those who are governed only by a principle of self-love to subject themselves to labors, to commerce, and to ties which their wants render necessary. And that they may reap advantage from them, and preserve in them both their honor and their interest, they observe in all these intercourses integrity, fidelity, sincerity; so that self-love accommodates itself to every thing, that it may reap advantage from all things. And it knows so well how to adapt its different steps to all its views, that it complies with all duties, and even counterfeits all virtues. And every one perceives in others, and, if he studied himself, would discover in himself, those refined ways which self-love knows how to employ for hiding and disguising itself under the appearances even of those virtues which are most opposite to it.

We see, then, in self-love, that this principle of all the evils is, in the present state of society, a cause from whence it derives an infinite number of good effects, which in their nature being true and real goods, ought to have a better principle; and thus we may consider this venom of society as a remedy which God makes use of for supporting it; seeing that although it produces in those persons whom it animates only corrupted fruits, yet it imparts all these advantages to society.

#### IV. *Four Foundations of the Order of Society in the Present State.*

All the other causes which God makes use of for preserving society are different from self-love in this, that whereas self-love is a real evil, from whence God draws good effects, the others are natural foundations of order; and of them we may observe four different kinds, which comprehend all that maintains society.

The first is religion, which takes in every thing that we can

see in the world, which is governed by the spirit of the primary laws.

The second is the secret government of God over society in the whole universe.

The third is the authority which God gives to sovereign powers.

The fourth is that light which remains to man after his fall, and which discovers unto him the natural rules of equity. And it is with this last that we shall begin, and ascend gradually to the others.

### V. *The Natural Knowledge of Equity.*

It is this light of reason, which, by discovering to all men the common rules of justice and equity, is instead of a law to them; which hath remained in all their minds, amidst the darkness which self-love hath spread over them. Thus, all men have on their minds the impressions of the truth and authority of these natural laws: that we must do harm to no man; that we must render to every one his due; that we must be sincere in our engagements, and faithful in executing our promises; and of other the like rules of justice and equity. For the knowledge of these rules is inseparable from reason; or rather, reason itself is nothing else but the view and use of all these rules.

And although this light of reason, which gives a view of these truths even to those persons who are ignorant of the principles of them, does not so far prevail in every one, as to be the rule and guide of his conduct, yet it reigns in all persons in such a manner, that the most unjust persons are so far in love with justice, as to condemn injustice in others, and to hate it. And it being the interest of every one in particular that others should observe these rules, the multitude agree together to reduce those to obedience who transgress the said rules, and who do harm to others. And this shows plainly, that God has engraven on the minds of all men this kind of knowledge, and love of justice, without which society could not last. And it is by the help of this knowledge of the natural laws, that even the nations which have had no knowledge of religion have made their societies to subsist.

\* Rom. ii. 14; — l. 7, D. de bon. damn.

## VI. *The Government of God over Society.*

This light of reason which God gives to all men, and these good effects which he draws from their self-love, are causes which contribute to the supporting of the society of mankind by the help of men themselves. But we ought to be sensible, that it has a foundation which is much more essential, and much more solid, which is the providence of God over mankind, and that order in which he preserves society in all times, and in all places, by his almighty power and infinite wisdom.

It is by the infinite force of that almighty power, that he, containing the universe as a drop of water, and as a grain of sand,<sup>d</sup> is present everywhere; and it is by the mildness of his infinite wisdom that he disposes and orders all things.<sup>e</sup>

It is by his universal providence over mankind, that he divides the earth among men, and that he distinguishes nations by that diversity of empires, kingdoms, republics, and other states; that he regulates the bounds and duration of them by the events which give them their rise, their increase, and their end; and that amidst all these changes he forms and maintains the civil society in every state, by the distinctions which he makes of persons to fill all the employments, and all the places, and by the other ways in which he regulates and governs every thing.<sup>f</sup>

## VII. *The Authority which God gives to the Supreme Powers.*

It is the same providence which, for the maintaining of society, establishes in it two sorts of powers that are proper to contain men within the order of their engagements.

The first is, that of the natural powers, which respect natural engagements; such as the power which marriage gives to the husband over the wife,<sup>g</sup> and that which birth gives to parents over their children.<sup>h</sup> But these powers being confined within families, and restrained to the order of these natural engagements, it was necessary that there should be another sort of power, of a more general and more extensive authority. And seeing nature, which distinguishes the husband from the wife, and parents from the children,<sup>i</sup> doth not in the same manner

<sup>d</sup> *Isa.* xl. 15.

<sup>e</sup> *Wisd. of Sol.* viii. 1.

<sup>f</sup> *Isa.* xlii. 5.

<sup>g</sup> *Eph.* v. 22; — *1 Cor.* xi. 3; — *Gen.* iii. 16.

<sup>h</sup> *Eph.* vi. 1; — *Eccles.* iii. 7.

make a distinction between other men, but renders them all equal;<sup>1</sup> God distinguishes some of them, that he may give unto them another sort of power, the ministry of which extends to the universal order of all kinds of engagements, and to every thing that relates unto society: and he gives the said power in different manners, in kingdoms, in commonwealths, and in the other states, to kings, to princes, and to the other persons whom he elevates to that dignity,<sup>1</sup> by birth, by election, and by the other ways in which he ordains or permits that those whom he destines to that rank should be called to it. For it is always the almighty providence of God that disposes of that series and chain of events, which precede the elevation of those whom he calls to government. Thus, it is always he who places them in the seat of authority; it is from him alone that they derive all the power and authority that they have; and it is the ministry of his justice that is committed to them.<sup>2</sup> And seeing it is God himself whom they represent in the rank which raises them above others, he will have them to be considered as holding his place in their functions. And it is for this reason, that he himself gives the name of gods to those to whom he communicates the right of governing and judging men; because it is a right which is natural to him alone.<sup>3</sup>

It is for the exercise of this power, that God puts into the hands of those who hold the first place in the government the sovereign authority, and the several rights that are necessary for maintaining the order of society, according to the laws which he hath established in it.

It is for the preserving of this order, that he gives them the right to make the laws<sup>4</sup> and regulations that are necessary for the public good, according to different times and places; and the power of inflicting punishments on crimes.<sup>5</sup>

It is on account of the same order, that he gives them the right to communicate, and to divide to several persons, the exercise of that authority, which they themselves are not able to exercise all alone in its several branches; and that they have

<sup>1</sup> *L. 32, D. de reg. jur.*

<sup>1</sup> *Eccles. xvii. 17.*

<sup>2</sup> *Wisd. of Sol. vi. 3; — Rom. xiii. 1; — John xix. 11; — Rom. xiii. 4; — Exod. xviii. 15; — 2 Chron. xix. 6.*

<sup>3</sup> *Exod. xxii. 28; — Psal. lxxxix. 6; — John x. 35; — Exod. xxii. 8.*

<sup>4</sup> *Wisd. of Sol. vi. 4; — Dent. xvii. 19.*

<sup>5</sup> *Prou. viii. 15.*

<sup>4</sup> *Rom. xiii. 4.*



the power of establishing the different sorts of magistrates, judges, and officers, that are necessary for the administration of justice, and for all the other public functions.\*

It is because of the same order, for supplying the necessary expenses of the state within, and for defending it from without, against the attempts of strangers, that sovereigns have the right to raise the necessary taxes, according to the occasions which may require them.†

It is to settle and confirm all these uses of the authority of temporal powers, that God commands all men to be subject to them.‡

### VIII. Religion.

Lastly, we ought to look upon religion as the most natural foundation of the order of society. For it is the spirit of religion that is the principle of the true order that ought to be in society. But there is this difference between religion, and all the other foundations of society, that whereas the others are common to all places, the true religion is only known and received in some states; and even in those where it is known, the spirit of it doth not so far prevail as to influence all persons to follow the rules of it. But yet it is certain, that, in the places where profession is made of the true religion, society is in its most natural state, and in the most proper for being maintained in good order, by a concurrence of religion and civil policy, and by a union in the ministry of the spiritual and temporal powers.

Since, therefore, it is the spirit of religion which is the principle of the order in which society ought to be, and that it ought to subsist by the union of religion and civil policy; it is of importance to inquire how religion and policy agree among themselves, and how they are distinguished for the forming of this order; and what is the ministry of the spiritual and temporal powers. And because this matter is an essential part of the plan of society, and hath a great affinity with the civil laws, it shall be the subject of the following chapter.

\* *Erod.* xviii. 21, 25.

† *Matt.* xxii. 21; — *Rom.* xiii. 6, 7.

‡ *Rom.* xiii. 1; — *1 Pet.* ii. 13; — *Tit.* iii. 1.

## CHAPTER X.

OF RELIGION AND POLICY: AND OF THE MINISTRY OF THE SPIRITUAL AND TEMPORAL POWERS.

*I. Religion and Policy founded on the Order and Appointment of God.*

It cannot be doubted but that religion and policy have their common foundation in the order and appointment of God; for a prophet tells us, that it is he who is our Judge, our Lawgiver, and our King, and that it is also he who is the Saviour of mankind.<sup>a</sup> Thus, it is he who in the spiritual order of religion establishes the ministry of the ecclesiastical powers.<sup>b</sup> Thus, it is he who in the temporal order of policy makes kings to reign,<sup>c</sup> and gives to sovereigns all the power and authority which they have. From whence it follows, that seeing religion and policy have only the same common principle of the divine order, they ought to agree together, and to support one another mutually, and in such a manner as that private persons may be able to pay a punctual and faithful obedience both to the one and the other; and that those who are employed in the ministry, both of the one and the other, may exercise it according to the spirit and the rules which reconcile them together. And it is likewise certain, that true religion and good policy are always united together.

*II. The Spirit of Religion.*

It is well known, that the spirit of religion is to bring back men to God, by the light of the truths which it teaches them, and to draw them out of the by-paths of self-love, in order to unite them in the exercise of the first two laws; and that therefore the essence of religion respects chiefly the inward part of the mind and heart of man, the good dispositions of which ought to be the principle of the external order of society.

*II. The Spirit of Policy.*

But because all men have not this spirit of religion, and that

<sup>a</sup> Isa. xxxiii. 22.

<sup>c</sup> Prov. viii. 15.

<sup>b</sup> John xx. 21; — Matt. x. 16 — 1 Cor. iv. 1.

even carry themselves so as to disturb the said external order; the spirit of policy is to maintain the public tranquillity among all mankind,<sup>d</sup> and to keep them in this order, whether they have the inward dispositions to it or not, by employing for that end even force and punishments, according as there is occasion: and it is for these two different uses of religion and policy, that God hath established, both in the one and the other, powers whose ministry he hath proportioned to their spirit and to their ends.

#### IV. *Distinction between the Ministry of the Spiritual Powers, and that of the Temporal.*

Thus, seeing the end of religion is only to form good dispositions in the inward part of man, God gives to the powers who exercise the ministry of it a spiritual authority, which tends only to regulate the mind and the heart, and to insinuate the love of justice, without the use of any temporal force upon the outward part.<sup>e</sup> But the ministry of the temporal powers of the civil policy, which tends only to regulate the external order, is exercised with the force that is necessary for restraining those who, not being lovers of justice, commit such excesses as disturb the said order.<sup>f</sup>

Thus, the spiritual powers instruct, exhort, bind, and loose the inward part of man, and exercise the other functions that are proper to this ministry. And the temporal powers command and forbid in what relates to the outward man; maintain every one in his rights; dispossess usurers; chastise the guilty, and punish crimes, by the use of penalties and punishments, proportioned to what the public peace requires.

Thus, the spiritual powers of religion, the spirit of which demands that the most wicked should live in order to become better, have no other ways for punishing of men, but by inflicting such penalties as may be proper to reclaim them to the duties which they have violated: and the temporal powers, whose business it is to preserve the public peace, ordain the penalties that are necessary for maintaining it, and punish even with death those who disturb the order of the society in such a manner as may deserve this punishment.

<sup>d</sup> 1 Tim. ii. 2.

<sup>e</sup> 2 Tim. iv. 2; — 2 Cor. i. 24.

<sup>f</sup> Rom. xiii. 4.

V. *Their Union for maintaining of Order.*

But these differences between the spirit of religion and the spirit of policy, and between the ministry of spiritual powers and that of temporal powers, have nothing in them that may be any hindrance to their union; and the same powers, spiritual and temporal, which are distinguished in their ministry, are united in their common end of maintaining order in society, and they mutually assist one another for that purpose. For it is a law of religion, and a duty incumbent on those who exercise the ministry of it, to recommend and to enjoin to every one obedience to the temporal powers, not only out of fear of their authority, and of the punishments which they inflict, but as an essential duty, and out of a principle of conscience, and a love of order. And it is a law of temporal policy, and a duty of those who are employed in the ministry of it, to maintain the exercise of religion, and to employ even the temporal authority and force against those who disturb the order of it. Thus these two powers agree together, and mutually support one another. And even when the spirit of the spiritual ministry seems to demand something that is contrary to the spirit of the temporal policy; as when the ministers of the spiritual power intercede for the life of the greatest criminals, whom they condemn only to penances, and whom the civil magistrate condemns to death, the same spirit of the spiritual ministry of religion, which requires princes and judges to do their duty, does not oblige them to use this clemency. And the temporal judges condemn justly to death those whom the ecclesiastical judges condemn only to works of charity, fasting, and other penances.

VI. *Why the Ministry of these Two Powers is placed in different Hands.*

It is because of these differences between the spirit of religion and that of policy, that God hath separated the ministry of them, that the spirit of religion which governs the inward man, and which ought to insinuate itself into the hearts of men by the love of justice, and by a contempt of temporal goods, should be inspired by other ministers than the temporal powers, who are armed with the terror of penalties and punishments for

maintaining the external order, and whose ministry chiefly relates to the use of temporal goods. And it was so essential to the order of these two administrations to have them distinct, and to have the spiritual power separated from the temporal, that although they be naturally united in God, yet when he appeared upon earth, in order to establish his spiritual kingdom, he abstained from the exercise of his power over temporal things. And all the use which he made of his greatness and power was wholly opposite to the grandeur and power which belong to a temporal kingdom. For at the same time that he manifested the divine grandeur of his spiritual kingdom by the light of the truths which he taught,<sup>a</sup> by the glory of the miracles which he wrought,<sup>b</sup> and by all the remarkable circumstances of his coming; which he had caused to be foretold by his prophets, and which were fit to accompany the reign of a prince of peace,<sup>c</sup> who came to give unto men other things than those that set them at variance with one another;<sup>d</sup> he took not any one of the marks of temporal power; he exercised no function of it; nay, he refused to be judge between two brothers, when one of them entreated him to do it.<sup>e</sup> And to show that the use of the temporal power was to be separated from his spiritual kingdom, he left that power to the temporal princes, and he himself paid obedience to them. Thus, in his birth, he made the circumstance of the place where he was to be born to depend on his obedience to a law of a heathen prince.<sup>f</sup> Thus, during his life, he taught his disciples to render unto princes what is their due; and he himself paid tribute, although none was due from him, for the reason which he gave at the same time when he wrought a miracle, that he might have wherewithal to pay it.<sup>g</sup> And at the time of his death, he told him who exercised the temporal power, and who employed it to so unjust a use, that he could not have had that power, if it had not been given him by God.<sup>h</sup> And he pointed out to him, likewise, the distinction between his spiritual kingdom and the temporal power of princes.<sup>i</sup>

It is true that on a certain occasion he gave a visible mark of his dominion over temporals,<sup>j</sup> and of a dominion more absolute than that which he intrusts to princes, by working a miracle,

<sup>a</sup> John vi. 12; — Isa. xlix. 6.

<sup>b</sup> Luke xiii. 17.

<sup>c</sup> Isa. ix. 6.

<sup>d</sup> Heb. ix. 11.

<sup>e</sup> Luke xii. 13.

<sup>f</sup> Luke ii. 1.

<sup>g</sup> Matt. xvii. 23.

<sup>h</sup> John xix. 11.

<sup>i</sup> John xvii. 36.

<sup>j</sup> Matt. viii. 23; — Mark v.; — Luke viii. 37.

which did some damage to the inhabitants of the place where he wrought it. But that very miracle, which plainly showed his omnipotent power over temporal things, served as a proof that he abstained from all other use of that power, only that he might show the distinction between the spiritual kingdom which he came to establish, and the temporal empire which he left unto princes.

Lastly, we know that, when he established the ministers of his spiritual kingdom, and when he gave them the rules of their conduct, and marked out to them the bounds of the power which he intrusted to them, he gave them no power over temporals. And we see likewise, that not any one of them took the least share in the ministry of the temporal power; that, on the contrary, they submitted themselves to it; and that, at the same time that they exercised their spiritual ministry without any regard to the authority of the temporal powers who opposed them in it, they taught their disciples obedience, and paid it themselves, to those very powers, in all things belonging to their ministry.

#### VII. *The Two Governments depend immediately upon God.*

It follows from all these truths, that the spiritual powers have the exercise of their ministry in spiritual things;<sup>1</sup> and that they do not intrude themselves upon temporals. And likewise that the temporal powers have the exercise of their ministry in temporal things,<sup>2</sup> and do not encroach upon spirituals: that the two governments are established immediately by the hand of God.

#### VIII. *The Authority of the Powers of one Order over those of the other, in their respective Functions.*

And that those who exercise the power in one of them are subject to those who exercise the power of the other, in all matters depending on it. And likewise we see, that those who have been animated by the spirit of God have governed themselves according to these very rules, and have observed the submission that is due to each of the powers of these two orders.

#### IX. *Example.*

Thus, when God made choice of Nathan for the spiritual

<sup>1</sup> *Erod. xxviii. 1; — 2 Chron. xix. 11; — Heb. v. 1.*

<sup>2</sup> *2 Chron. xix. 11.*

ministry of the correction of David, the temporal power of this king did not withhold the prophet from speaking to him with a force suitable to the authority of the ministry which he exercised; and that prince received likewise the correction with humility.\* But, on the contrary, when the same prophet had a mind to know the intention of that prince concerning the choice of his successor, and whether he meant that it should be either Solomon, or Adonijah, he approached him with the greatest humility and respect, beseeching him to let him know which of the two he would be pleased to make choice of to reign after him.†

### X. *Obedience to both the Governments.*

It would be easy to bring other examples of the like nature, to show how it is necessary to distinguish the authority of the spiritual powers from that of the temporal powers, and in what manner those persons have exercised their authority who have governed themselves according to the just rules, by confining themselves to their own proper ministry, without meddling with the other. But it sufficeth for the design proposed, to have given this general idea of the two governments of religion, and of civil policy; that we may discern therein the spirit and use both of the one and the other; that we may see in it the principles which reconcile them, and which distinguish them; and that we may be able to judge, by all these views, of the manner in which they concur to support the order of society.

### XI. *Laws of Spiritual Powers, which relate to Temporal Things.*

It may perhaps here occur to the reader's thought, that the spiritual powers have made rules concerning temporal matters; such as are in the canon law, those relating to contracts, testaments, prescriptions, crimes, the order of judicial proceedings, the rules of law, and other matters of the like nature.

### XII. *Laws of Temporal Powers concerning Spiritual Things.*

And that we likewise see laws enacted by temporal powers in matters purely spiritual: such as some constitutions of the first Christian emperors, and ordinances of our princes touching matters of faith and of church discipline. But what is in the canon law relating to temporal matters cannot prove that the

ecclesiastical powers regulate temporal concerns. It appears, on the contrary, that at the beginning of the canon law, where distinction is made between the Divine laws and human laws, it is said that the human laws are the laws of princes; that it is by these laws that the rights to every thing which man can possess are regulated; and that even the goods of the church are preserved to it only by the authority of these laws; because it is to princes that God hath given the ministry of the government in temporal things.<sup>1</sup> Since, therefore, there can be nothing in the canon law which overturns this rule, it follows that the rules which we see in it concerning temporal matters are capable of being reconciled with this principle; which it is no hard matter to do, if we make reflection on the use which the rules relating to temporal affairs have in the canon law. For we shall find that, for example, the rules concerning the order in judicial proceedings relate to the ecclesiastical jurisdiction; that those about crimes establish there the canonical punishments, that is to say, the punishments which the church enjoins for the penance of criminals; that the rules which relate to contracts, testaments, prescriptions, and to other matters of the like nature, relate to them only in reference to spirituals, as because of the prohibition of certain commerces to ecclesiasties, because of the religion of an oath, and because of the use of covenants for churches, and particular church-men, and because of other views of the like nature; that some of these rules are only answers of the popes to consultations; and lastly, that whatever rules there are there, which relate purely to temporal things among laymen, ought to be considered only as rules binding the subjects of the territories of the see of Rome, in which the popes are temporal princes; and without the said territories, they have no other authority than what is given them by the princes who receive the use of them among their subjects. Concerning which it may be observed, that these sorts of constitutions in the canon law concerning temporal matters show plainly enough that they are naturally derived from the temporal authority, seeing the greatest part of them have been taken out of the Roman law, although it be true that some of them are contrary to it. But it is not necessary that we should treat of that matter in this place.

<sup>1</sup>. *Distinct.* 8, can. 2.



As to the regulations which temporal princes may have made touching spiritual matters, they have not extended their authority to the spiritual ministry that is reserved to the ecclesiastical powers, but they have only employed their temporal authority to put the laws of the church in execution, in the external order of the government of the church. And even those very ordinances, which our kings themselves call political laws, tend only to maintain the external policy of the church, and to restrain those who disturb it by transgressing the ecclesiastical laws.\*

### XIII. *Kings are the Protectors and Defenders of the Laws of the Church.*

And likewise it appears from the ordinances themselves, that the princes ordain nothing in them, but what properly belongs to their temporal power, and call themselves therein the protectors, guardians, and defenders of the faith, and executors of what the Church teaches and ordains.<sup>b</sup>

### XIV. *Agreement between the Spiritual and Temporal Jurisdiction.*

Another difficulty might be started in relation to some matters, where it would seem as if the spiritual and temporal jurisdiction encroached one upon the other; as, for example, when the temporal jurisdiction takes cognizance of the right of possession in benefices; and when the ecclesiastical jurisdiction judges of temporal concerns between ecclesiastical persons. But as to what concerns the possession of benefices, it is a matter purely of temporal jurisdiction, which alone has the right of joining force to authority, for preventing acts of violence, and for restraining usurpers. And as to the right which ecclesiastical persons have to judge of temporal matters in causes between ecclesiastics, it is a privilege which princes have granted to the spiritual jurisdiction, in favor of the church.

We have endeavoured, by what has been said in this and the preceding chapters, to give a general idea of the plan of the society of mankind upon the natural foundations of the order which God hath established in it; and to show that the first principles of that order are the two primary laws: that the engagements which link men together in society are conse-

\* Charles IX., Jan. 17, 1561.

<sup>b</sup> Francis I., in July, 1543.

quences of these two primary laws; and that they are likewise the sources of all duties, and the foundations of the different kinds of laws: and we have begun to descend from those general principles, to the principles which are peculiar to the civil laws. It remains at present, before we proceed to inquire into the detail of these laws, and of the matters of which they treat, that we examine more minutely the nature and spirit of laws in general, and the characters which distinguish their different kinds; that we may thereby discover the foundations of many rules that are essential to the knowledge and right use of the civil laws: and this shall be the subject-matter of the two following chapters.

## CHAPTER XI.

### OF THE NATURE AND SPIRIT OF LAWS, AND THEIR DIFFERENT KINDS.

#### I. *Two Sorts of Laws: Laws Immutable, and Arbitrary Laws.* — *The Nature of these Laws.*

ALL the different ideas which it is possible to conceive of the several sorts of laws that are expressed by the names of divine and human laws, natural and positive, spiritual and temporal, law of nations, civil laws, and by all the other names that can be given them, may be reduced to two kinds, which comprehend all laws of what nature soever; one is, of the laws which are immutable, and the other, of the laws that are arbitrary. For there is not any one law but what has one or other of these characters; which it is of moment to consider, not only for apprehending aright this first general distinction of laws into these two kinds, which ought to precede the other ways of distinguishing them, but because it is these two characters which are the most essential part in the nature of all laws; and therefore the knowledge of them is necessary, and of great use in the study of the civil law.

The immutable laws are so called, because they are natural, and so just at all times, and in all places, that no authority can either change or abolish them: and the arbitrary laws are

those which a lawful authority may enact, change, and abolish, as there is occasion.

These immutable or natural laws are all of them such as are necessary consequences of the two fundamental laws, and which are so essential to the engagements which form the order of society, that it is impossible to alter them without destroying the foundations of the said order: and the arbitrary laws are those which may be differently established, changed, and even quite abolished, without violating the spirit and intent of the fundamental laws, and without destroying the principles of the order of society.

### II. *Example of Immutable Laws.*

Thus, seeing it is a consequence of the first fundamental law, that we ought to obey the higher powers, because it is God that hath established them; and because it is a consequence of the second fundamental law, that we ought to do harm to no man, and that we ought to render to every one his due; and because all these laws are essential to the order of society; they are for this reason immutable laws. And it is the same thing with respect to all the particular rules which are essential to this order, and to the engagements which follow from the primary laws. Thus, it is a rule essential to the engagement of a tutor, that, being in the place of a father to the orphan who is committed to his charge, he ought to be careful in looking after the person and the estate of the said orphan; and it is likewise an immutable law, that the tutor ought to take this care. Thus, it is a rule essential to the engagement of the person who borrows something belonging to another, that he ought to preserve it; and it is also an immutable law, that he ought to be answerable for the faults which he commits contrary to this duty.

### III. *Example of Arbitrary Laws.*

But the laws concerning matters which are left indifferent by the two primary laws, and the engagements which are consequences of them, are arbitrary laws. Thus, seeing it is indifferent with respect to the two primary laws, and the order of engagements, whether there be five, six, or seven witnesses to a testament; whether prescription be acquired in twenty, thirty, or forty years; whether money be of a higher or a lesser value; these are only arbitrary laws which regulate these sorts of

things, and they regulate them differently according to the times and places.

#### IV. *Origin of the Immutable Laws.*

It appears from this first idea of the nature of immutable laws, that they derive their origin from the two prime laws, of which they are only an extension; and that, for example, the natural rules of equity which have been observed, and the others of the like nature, are nothing else but what the spirit of the second law demands in every engagement, and what it points out to be essential and necessary to it.

#### V. *Origin of the Arbitrary Laws.*

As for the arbitrary laws, we may remark two different causes which have rendered the use of them necessary in society, and which have been the sources of that infinite multitude of arbitrary laws which we see in the world:

#### VI. *The First Cause of Arbitrary Laws, the Difficulties which arise from the Immutable Laws.*

The first of these two causes is the necessity of regulating certain difficulties which arise in the application of the immutable laws, when the said difficulties are such as that they cannot be provided against but by laws, and when the immutable laws do not regulate them. We shall be able to judge of this sort of difficulties by some examples.

#### VII. *First Example.*

Thus, for a first example of the necessity of arbitrary laws: it is a natural and immutable law, that fathers ought to leave their estates to their children after their death; and it is also another law which is commonly placed in the number of the natural laws, that one may dispose of his goods by a testament. If we give to the first of these two laws an extent without any bounds, a father may dispose of nothing by testament; and if we extend the second law to an indefinite liberty of disposing of all by will; as did the ancient Roman law, a father may exclude his children from having any share in his inheritance, and may give all his goods to strangers.

• We see by these consequences, which are so opposite to one another, and which would follow from these two laws taken in

an indefinite extent, that it is necessary to set some bounds both to the one and the other, which may reconcile them together. And if all men did govern themselves by prudence, and by the spirit of the primary laws, every one would be a just interpreter of what the law, by which children succeed to their parents, demands of him in particular, and likewise of what he is obliged to by virtue of that law which allows every one to dispose of his effects by testament. For he might proportion the dispositions of his testament to the condition of his estate, and of his family, and to the duties which he may owe to his children, and to other persons, according as he may be under obligations either to make some grateful requital, or to do some act of liberality. But because all persons do not govern themselves according to the spirit of the primary laws, nor according to prudence; and some persons, abusing the liberty of disposing of their goods by will, or perhaps being ignorant of the state of their goods, and of their affairs, violate the duty which they owe to their children; seeing it is not just to leave an indefinite liberty to those who may abuse it, and that it is not possible to make a particular rule for every one; it was necessary, for reconciling these two laws, and for reducing them into rules common to all men, to make an arbitrary law, which might restrain the liberty of disposing by will to the prejudice of children, and which might preserve to them a certain portion of the goods of their parents, which it should not be in the power of their parents to deprive them of; and it is this portion, fixed by an arbitrary law, which is termed the legitime, or filial portion.

#### VIII. *Another Example.*

Thus, for another example, it is a natural and immutable law, that he who is the owner of a thing should always continue to have the property of it, until he has divested himself of it voluntarily, or until he be divested of it by some just and legal way: and it is likewise another natural and immutable law, that possessors ought not always to be in danger of being molested in their possession for ever; and that he who has been in possession of a thing for a long time, should be looked upon as the owner of it; because men are naturally careful not to abandon to others what belongs to them, and because we ought not to presume, without proof, that a possessor is an usurper.

If we extend too far the first of these two laws, which declares

that the owner of a thing cannot be deprived of it but by just titles and conveyances; it will follow, that whosoever can show that either he himself, or they from whom he derives his right, have been owners of an estate, although they had been out of possession of it for more than a century, will be restored to the said estate, and turn out the possessor, unless, together with his long possession, he can show a title which hath taken away the right of the first owner. And if, on the contrary, we extend too far the rule which makes it be presumed that the possessors are owners of what they possess; we shall be guilty of injustice, by taking away the property from all those who happen not to be in possession.

It is evident, that the contrariety to which these two laws might lead us, one of them restoring the first owner against an ancient possessor, and the other maintaining a new possessor against the right owner, required that it should be regulated by an arbitrary law, that they who are not in possession, and who should notwithstanding claim the right of property, should be bound to assert and prove their right within a certain time; and that after that time the possessors, who had not been molested in their possession, should be maintained in it. And this is what has been done by the arbitrary laws, which settle the times of prescriptions.

### IX. *A Third Example.*

Thus, for a third example, it is a natural and immutable law, that persons who have not as yet attained to a firm and steady use of their reason, for want of age, instruction, and experience, should not have the management of their estates and affairs; and that they may have it after they shall have acquired reason and experience enough. But seeing nature doth not produce in all men at the same age that ripeness of reason which is necessary for the management of affairs, and that it comes sooner in some, and later in others; in order to apply this law to use, it has been found necessary to make an arbitrary law, for settling a rule that might be common to all men. Thus, the civil laws of some countries have left it to the fathers to regulate to what age their children should remain under the conduct of a tutor; and in other countries they fixed a certain period of age, under

which persons were to be in that state which is called minority, ~~and~~ above which they were to be reputed majors.

#### X. *Fourth Example.*

Thus, for a last example, it is a natural law, that he who buys should not take advantage of the necessity of the person who sells, and that he should not buy at too low a price.<sup>b</sup> But because it would be a thing of troublesome consequence in trade to annul all the sales where a thing is sold under its true value, it has been regulated by an arbitrary law, that sales should not be dissolved on account of the lowness of the price, except in the case where lands and tenements are sold for less than the half of the just value. And the laws connive, for the public good, at the injustice of buyers, where the damage done is less than the half of the value, unless there be other particular circumstances in the sale, which may make it necessary to rescind it.

#### XI. *The Immutable Laws implied in these Sorts of Arbitrary Laws.*

We must observe in all these examples, and others of the like kind of arbitrary laws, which are consequences of the immutable laws, that every one of these arbitrary laws hath two characters, which it is of importance to discern, and to distinguish in them, and which make, as it were, two laws in one. For in these laws, there is one part of what they ordain which is of the law of nature, and there is another part of them which is arbitrary. Thus, the law which regulates the filial portion of children includes two dispositions: one which enacts that children should have a share in the inheritance of their fathers, and this is an immutable law; and the other, which regulates this portion to a third, or a moiety, or more, or less, and this is an arbitrary rule. For it might have been either two thirds or three fourths, if the lawgiver had thought fit to settle it so.

#### XII. *Second Cause of Arbitrary Laws: Matters of which the Use has been invented.*

The second cause of the arbitrary laws was the invention of certain usages, which were thought to be useful in society.

Thus, for example, fiefs have been invented, quitrents, annuities, the right of redemption, substitutions, and other usages of the like nature, the establishment of which was arbitrary. And these matters, which are the invention of man, and which may be termed for that reason arbitrary matters, are regulated by a vast number of laws of the same nature.

Thus, we see in society the use of two sorts of matters. For there are some which are so natural, and so essential to our most common wants, that they have been always in use, in all places, such as exchange, letting and hiring, deposit, the contract of loan, and many other covenants; guardianships, successions, and many other matters; and there is also the use of matters that are invented. But it is to be observed, that even those matters of which men have invented the use have always their foundation in some principle of the order of society. Thus, for example, fiefs have their foundation, not only in the general liberty of making all sorts of covenants, but also in the advantage which redounds to the public, by engaging in the service of the prince, in the time of war, those to whom capital fees and mesne fees have been given, and their successors.

Thus, substitutions, or entails, are founded upon the general liberty which every one has to dispose of his estate with the view of preserving the estate in families, the conveniency of taking away from certain heirs, executors, or legatees, the liberty of disposing by will, of which they might make a bad use, and other motives of the like nature.

### XIII. *The Natural Matters have Arbitrary Laws, and the Invented Matters have Natural Laws.*

It is to be observed, likewise, on the subject of these matters which have been invented by men, that although it would seem that they ought to be regulated wholly by arbitrary laws, yet nevertheless they have many immutable laws relating to them: in the same manner as we see that the other matters, which may be called natural, are not only regulated by natural and immutable laws, but that they have also arbitrary laws.

### XIV. *Examples.*

Thus, it is an immutable law in the matter of fiefs, that we ought to observe in them the conditions regulated by the title which contains the grant of the fief. Thus, in the natural mat-



ter of tutorships, it is an arbitrary law that hath fixed the number of children which exempts from that office. So that it appears by these examples, and by others which have been already taken notice of, that in all matters, both natural and others, there is a mixture of immutable laws and of arbitrary laws.

#### *XV. Few Arbitrary Laws in Natural Matters.*

But with this difference, that in the natural matters there are few arbitrary laws, and that the greatest part of the laws relating to such matters are immutable; and that, on the contrary, there is an infinite number of arbitrary laws in those matters which have been invented.

#### *XVI. Many Arbitrary Laws in Arbitrary Matters.*

Thus we see in the Roman Law, that, as the greatest part of the matters contained in it, which are of use now-a-days, are natural matters, so the rules concerning them are almost all of them natural laws; and that, on the contrary, the greatest part of the matters of our customs being arbitrary matters, the greatest part of their rules are arbitrary also, and different in divers places; and we see likewise, in the arbitrary matters which are regulated by the ordinances, that almost all their rules are also arbitrary.

#### *XVII. Two Sorts of Arbitrary Laws: those which are Consequences of the Natural Laws, and those which regulate Matters that are invented.*

Arbitrary laws are therefore of two sorts, according to the two causes which have given rise to them. The first is, of those arbitrary laws which have been consequences of the natural laws; such as those which regulate the filial portion of children, the age of majority, and other matters of the like nature; and the second is, of those laws that have been invented for the regulation of arbitrary matters; such as the laws which settle the degrees of substitutions, and the rights of relief in fiefs, and other the like matters.

#### *XVIII. Four Sorts of Books which contain the Arbitrary Laws observed in this Kingdom: the Roman Law, the Canon Law, the Ordinances, and the Customs.*

All the arbitrary laws of these two kinds are contained in four

sorts of books, which are made use of in France; and that is, the books of the Roman law, the canon law, the ordinances, and the customs. From whence we may distinguish, under another view, four kinds of arbitrary laws that are in use in this kingdom.

The first comprehends some arbitrary laws of the body of the Roman law, which have been received in this kingdom, and which derive their authority with us from the use which we give them; such as, for instance, that law which has been already taken notice of, touching the rescission of sales on account of loss sustained by the sale in more than the half of the real value; the laws which regulate the formalities of wills and testaments, the time of prescriptions, and the other laws of that kind, which are received either throughout the whole kingdom, or only in some provinces.

The second sort is that of the arbitrary laws which are taken out of the canon law, and received in use with us. Such are many rules relating to church benefices, and other ecclesiastical matters; and some of them even in matters of the civil law.

The third is, of the arbitrary laws which are established by the ordinances of our kings. Such as those which regulate the rights of the prince's demesnes, the punishments of crimes, the order of judicial proceedings, and many other matters of several kinds.

The fourth sort of arbitrary laws consists of those which we call customs, such as we see in most of the provinces, and which regulate several matters; such as fiefs, the community of goods between husband and wife, dowries, the filial portions of children, the right of redemption by one of the family, the right of redemption of fiefs, and many others. And all these customs are so many arbitrary laws, which, in relation to the same matters, are different in divers places. And because these customs were a kind of laws, which, not being written, were preserved only by use, and this use was often uncertain; our kings have caused to be collected together, and reduced into writing, in each province, and in each place, the customs which were there received, and have given them the sanction of laws and rules.

*XIX. The particular Rules of the Law of Nature are nowhere collected but in the Body of the Roman Law.*

We have, then, in France, as there is in all other countries, the

use of natural laws and of arbitrary laws. But with this difference between these two sorts of laws, that all the arbitrary laws which we have, being contained in the ordinances, and in the customs, and in such arbitrary laws taken out of the body of the Roman law, and of the canon law, as we observe as customs, all these laws have a certain and fixed authority. But as for the laws of nature, seeing we have nowhere the detail of them except in the books of the Roman law, and that they are placed there not in the best order, and mixed with many other laws which are neither natural nor in use with us, their authority is so weakened by this mixture, that many persons either are not willing, or not capable, to discern that which is certainly just and natural from that which reason and our practice do not admit of. Concerning which matter, the reader may observe what hath been said of it in the preface to this book.

*XX. The Justice and Authority of all Laws: the Difference between that of Natural Laws, and that of Arbitrary Laws.*

It is easy to perceive from this distinction of natural laws and arbitrary laws, and from the remarks which have been made on these two kinds of laws, what are the different characters of their justice and of their authority. And seeing it is the justice and the authority of laws which give them the force which they ought to have upon our reason, it is of moment to consider and to distinguish what is the justice and authority of natural laws, and what is the justice and authority of arbitrary laws.

The universal justice of all laws consists in the relation which they have to the order of society, of which they are the rules. But there is this difference between the justice of the laws of nature and the justice of arbitrary laws, that, the laws of nature being essential to the two primary laws, and to the engagements which are consequences of them, they are essentially just; and that their justice is always the same, at all times, and in all places. But the arbitrary laws being indifferent to these foundations of the order of society, so that there is not any one of them which may not be altered, or abolished, without overturning the said foundations; the justice of these laws consists in the particular advantage that is found by enacting them, according as the times and the places may require.

The universal authority of all laws consists in the divine ap-

pointment, which commands all men to obey them. But as there is a difference between the justice of natural laws and the justice of arbitrary laws, so likewise their authority is distinguished in a manner suited to the difference of their justice.

The laws of nature being justice itself, they have a natural authority over our reason, which is given us for no other end but that we may discern justice and truth, and may submit to it. But because all men have not always their reason clear enough for discerning this justice, or their heart upright enough for obeying it, civil policy gives to these laws another empire over men, independent on their approbation of them, by the authority of the temporal powers, who compel men to obey them: But the authority of the arbitrary laws consists purely in the force which they derive from the power of those who have a right to make laws, and in the appointment of God, who commands obedience to be paid to them.

This difference between the justice and authority of natural laws, and that of arbitrary laws, hath this effect: that whereas arbitrary laws cannot be naturally known unto men, they are facts which men may be ignorant of; but the laws of nature being essentially just, and the natural object of reason, no man can say, that he wants the light of reason which teaches us them. For which reason, arbitrary laws do not begin to have their effect, till after they have been promulged. But the laws of nature have always their effect, without any promulgation. And seeing they can neither be changed nor abolished, and that they have their authority from themselves, they are always binding upon men, and no one can pretend ignorance of them.

*XXI. Remarks on the Distinction of Immutable Laws, which admit neither of Dispensation nor Exception, and of those which do admit of them.*

But although the natural or immutable laws be essentially just, and although they cannot be changed; yet we must take care not to imagine from this idea of natural laws, that, because they are immutable, and suffer no change, they therefore are such that there can be no exception to any one of the laws which have this character. For there are many immutable laws which admit of exceptions and dispensations, and yet do not lose the character of immutable laws; as, on the contrary, there are many of them which admit of no dispensation or exception.

This difference, which distinguishes these two sorts of laws, hath its foundation in this, that laws have their justice and authority, only because of the relation which they bear to the order of society, and to the spirit of the two fundamental laws; so that if it happen that the order of society, and the spirit of those fundamental laws, require that some of the immutable laws be restrained, either by exceptions or by dispensations, they admit of those mitigations; and if nothing can be changed without violating the said spirit and the said order, they do not admit either of dispensation or exception. But even the laws which do admit of these restrictions do not for that reason cease to be immutable; for it is still true that they cannot be abolished, and that they are always certain and irrevocable rules, although they be less general because of these exceptions and dispensations. All these truths will better appear by some examples.

Thus, the laws which enjoin honesty, fidelity, sincerity, and which forbid deceit, fraud, and all manner of tricking, are laws which can admit of no dispensation or exception.

Thus, on the contrary, the law which forbids swearing admits of a dispensation in the case of a judicial oath, when it is necessary to give testimony to the truth; and an oath is also made use of as a corroboration of the engagement of those who are admitted into offices.

Thus, the law which commands the performance of covenants suffers an exception and dispensation in the case of a minor, who engages himself rashly to his own prejudice.

Thus, the law which ordains the seller to warrant what he has sold against the pretensions of all others who may claim a right to it, allows the parties to derogate from this warranty, by an express agreement to discharge the seller from all other warranty besides that against his own fact and deed: either because he sells on this consideration at a lower price, or for other motives, which make it just that he should be freed from the warranty.

## XXII. *The Foundation of Exceptions and Dispensations, and their Nature.*

It is easy to perceive by these few instances, that these exceptions and dispensations have their foundation in the spirit of the laws; and that they themselves are other laws, which do not

alter the character of the immutable laws to which they are exceptions; and that thus all the laws are reconciled one with another and agree among themselves, by the means of that common spirit which is the justice of every one of them. For the justice of every law is included within its proper bounds, and none of them extends to what is otherwise regulated by another law. And it will appear in all sorts of exceptions and dispensations, which are reasonable, that they are founded upon some law. So that we must consider the laws which admit of exceptions as general laws, which regulate every thing that commonly happens; and the laws which make the exceptions and dispensations as particular laws, which are peculiar to certain cases; but both the one and the other are laws and rules equally just, according to their use and their extent.

XXIII. *The Importance of distinguishing the Characters and the Spirit of the Laws.*

All these reflections on the distinction of immutable laws and arbitrary laws, on their nature, their justice, their authority, show plainly of what importance it is to consider, under all these views, what is the spirit and design of all these laws; to discern whether they have the character of immutable laws, or of arbitrary laws; to distinguish between the general rules, and the exceptions to them, and to make the other distinctions which have been remarked; and the same may be said of the distinctions which shall be mentioned hereafter. Nevertheless, it appears plainly enough by experience, that although there be nothing more natural and more real than the foundations of all these remarks, many seem either to be ignorant of them, or to despise them; and do not so much as perceive the bare difference between the immutable laws and the arbitrary laws. So that they consider them all, without distinction, as having the same nature, the same justice, the same authority, and the same effect. For seeing they compose all of them together an infinite medley of rules concerning all matters, both natural and invented, and that they have only one common name of laws, they mistake in this medley the characters which distinguish them, and often take natural rules for bare arbitrary laws, especially when the said rules have not the evidence of the first principles on which they depend, and are only remote consequences of them. For not perceiving in that case the

connection which the said rules have with their principles, they do not discover the foundation and the certainty of their truth.

And since, on the contrary, arbitrary laws are always clear and evident, because they are written, and contain only sensible dispositions, which for the most part are comprehended without reasoning, most men receive a much stronger impression from the authority of arbitrary laws, than from natural rules, which do not so sensibly affect the mind. And when it happens that persons, whose judgment is not so exact, and whose memories are stuffed with a great number of laws of all kinds, want this view, and do not make the reflections that are necessary for a right use of the laws, and for giving to every one of them its just effect, there is great hazard of their considering them under false views, and of making wrong applications of them; especially when they endeavour, as most people do, to find out laws, not for the support of reason, but of the party whose cause they have espoused; and then they have no other view but to give to the rules an extent suited to the sense which may most serve their interest.

It is easy to see by experience the ways in which persons go astray who thus confound the laws: and we may perceive, by barely reflecting on the different sentiments of people touching questions of all kinds, that those who fall into an error are engaged in it for want of some one of these views; and that those who reason justly discover the truth, only because they discern the ways of distinguishing, of choosing, and of applying the rules, and that even when they do not reflect on the natural principles which enable them to make this judgment.

#### XXIV. *Example of the Consequence of distinguishing between Immutable Laws and Arbitrary Laws.*

But although it be easy to conceive, without the help of any particular example, of what great importance it is, in the application of the rules, to know their nature, their spirit, and their use; yet since some people may be apt to fancy, that, of all the things necessary to be considered in laws, there is nothing more easy to be perceived than the distinction of those which are natural and immutable, and of those which are arbitrary; and that it may seem impossible to mistake for the want of this view: it is of moment to show, by a very remarkable example,



that there is often danger of people's erring, by reason of their not discerning these matters, although so easy to be done.

All those who have any knowledge of the Roman law may remember that law that is taken out of one of Papinian's decisions, which says, that the pupillary substitution excludes the mother from her legal portion of the inheritance: that is to say, that, if a father substitutes either a relation, or a stranger, to his son, to succeed him in case he dies before he arrives at the age of puberty, the person so substituted shall succeed him, even although the mother of this child had survived him; and by this substitution, she will be deprived of her legal portion of her child's inheritance.\*

This decision is founded upon this reasoning of Papinian; that it is not the son who deprives his mother of his goods; but that it is the father, who, by virtue of the liberty which he had to dispose of them, has made them go to the substitute.

If we examine this decision, it will appear, that the ground of the question was the apparent opposition between a natural law and an arbitrary law; and that the arbitrary law, which gave leave to the father to substitute, and by an extension of that liberty even to deprive the mother of her legal portion, and to transmit the goods to the substitute, was preferred before the natural law, which calls the mother to the inheritance of her son.

I do not here quote this example with design to lessen the just esteem that is due to so celebrated a lawyer. But it is known that he gave this judgment according to the principles of that ancient law of the Romans, which favored the liberty of disposing by testament, and which at first went to that excess, that fathers could disinherit their children without cause. It was by the spirit of this principle that he invented that subtilty, that it was not the son who did this wrong to his mother, but that it was the father: *quia pater hoc ei fecit*.

Thus, this decision being founded only on the principle of this unbounded liberty of disposing of one's estate by testament, even to the depriving children of their filial portion, which is a principle that is neither natural nor in use with us, we ought not to take for a rule a subtilty, which, to favor this principle, deprived the son of his legal portion of the goods of his father,

\* L. 8, § 2, D. de inoff. test.



and the mother of her legal portion of the goods of her son; for this decision made all the goods of the testator to go to the substitute, without allowing the son to transmit any part of it to his heirs.

We may therefore place this subtilty among many others of the Roman law which we reject, because that law is received with us only as written reason, and subtilties, being contrary to natural right, are contrary to reason. And although there be no occasion to quote any authority, to prove that we ought to prefer natural right to these subtilties, yet we may found this truth on the authority of the same lawyer, who in another question, much of the same nature, has decided in favor of natural right. It was in the case of another substitution, made by a grandfather to his grandson, in case he should die before he attained to the age of thirty years, in which case he ordered that the goods should be restored to a son of this testator, uncle to the grandchild. The case happened, the grandson died before the age of thirty, but left children. And from this circumstance Papinian decided in favor of the children, that the substitution was annulled; for the reason, that it was equitable to conjecture that the testator had not sufficiently explained his intention, and that although he had made no mention of the case of his grandson having any children, yet he did not intend to deprive those children of their father's inheritance.<sup>d</sup> Such a conjecture as this, in the first case of the pupillary substitution, might have made it to be presumed, that the father did not foresee that the son might die before his mother; and it was much easier for the grandfather in the second case to foresee that his grandson might, before he was thirty years old, have children, than for the father in the first case to foresee that the grandson might not survive his mother. So that it might have been presumed, that his intention was not to call the substitutes to the succession, but in case the mother should not be living at the time of the son's death.

#### XXV. *The Danger of violating Natural Law, under Pretext of preferring it to an Arbitrary Law.*

But if it is of importance not to destroy natural equity by subtilties, and false consequences drawn from arbitrary laws, as

<sup>d</sup> L. 102, D. de concit. et demonstr.

appears by this example, and as it would be easy to show from others, it behooveth likewise to take heed, that, under the pretext of preferring natural laws to arbitrary laws, we do not extend a natural law beyond the just bounds which are set to it by an arbitrary law, which reconciles it with another natural law, and which gives to the one and to the other their just effect each; and that we do not thus violate that other natural law, while we think of touching only the arbitrary law.

### XXVI. *Example.*

Thus, for example, it is a natural law, that he who has been the author of any damage ought to repair it. But if we should extend this law so far, as to oblige the debtor who had not paid at the term to make good all the damage which the creditor may have suffered for want of his payment; as if an estate had been seized and sold, or if his house had fallen down, because he had not that money which he would have laid out in repairing it; such an application of this law, which is highly just, and altogether natural, in obliging one to repair the damage which he has done, would be unjust, because it would violate an arbitrary law which regulates all damages, to which the debtor may be made liable for default of payment, to that reparation of damages which is called interest, and which is fixed to a certain portion of the sum that is due, which at present is about the twentieth part; and that by violating this arbitrary law, one would infringe two natural laws which are the foundation of it: one, which does not allow that men should be made accountable for unforeseen events, which are rather effects of the divine providence, and accidents, than consequences that can reasonably be imputed to them; and the other, which will have the infinite variety of the different damages, which creditors suffer for want of payment of what is due to them, to be fixed to a certain and uniform reparation of damages, which may be common to all the cases which have the same common cause of the default of payment at the term, without distinguishing the events which cause different sorts of losses. For besides that the difference of the losses is an effect of the difference of the accidents, which nobody is obliged to answer for; the diversity of the reparations would be a source of as many lawsuits as there would be creditors, who should pretend to distinguish them-

selves by the quality of the loss which had been occasioned by the default of payment.\*

**XXVII. *Discernment of the Spirit of the Laws necessary for deciding Questions.***

We see again in this example, as we have already seen in the others which have been mentioned to show the necessity of arbitrary laws, that there are difficulties which make it necessary to fix a general regulation by an arbitrary law. But there is an infinite number of other sorts of difficulties which arise every day in the application of the laws to differences between particular persons, where it is neither necessary nor possible to establish precise rules: and the decision of difficulties of this kind depends on those who are to judge of them; which requires on one part an exact judgment and understanding; and on the other, a knowledge of the principles, and particular rules, that they may be able to judge of the apparent opposition between the rules on which the contrary opinions are founded, and those which give rise to the difficulty; and to discern by the spirit of these rules the bounds and extent that ought to be given to them, and the consequences which will follow from the restraining too much either the one or the other, or from extending it too far. It is by these, and the other views of the principles of the interpretation of laws, which have been already mentioned, and of those which shall be explained in their proper places, that we are enabled to make a true and just application of the rules.

**XXVIII. *The Necessity of studying the Laws of Nature.— The Causes of this Necessity.***

What is here remarked touching the necessity of knowing all the particular laws, respects chiefly the laws of nature. For although it may seem that reason teaches us the laws of nature, and that it is much easier to understand them well than the arbitrary laws, which are naturally unknown; yet, it is much more difficult, and also of greater importance, to know thoroughly the laws of nature, than to know the arbitrary laws: because, whereas these are within a narrower compass, and require only a memory to retain them, the natural laws, which regulate the matters that are of most common use, and of greatest im-

\* See, in relation to all this, the eighteenth article of the second section of the *Contract of Sale*; and the beginning of the title of *Interest, Costs, and Damages*.

portance, are in a much greater number; and they are properly the object of the understanding. So that there are two causes which make it necessary to study these natural laws with exactness and application.

The first of these causes is, that, these natural rules being very numerous, their variety and their multitude is the reason why they do not all present themselves to the view of every one: and reason alone is not sufficient to enable any one to find them out, and to apply them to all occasions, as will appear by the bare reading of all these rules in the detail of matters.

The second cause of the necessity of knowing exactly the natural laws is, that these laws are the foundations of the whole science of law: and it is always by arguments drawn from the natural laws, that we examine and resolve questions of all kinds; whether they arise from the apparent opposition of two natural laws, or from that of a natural law to an arbitrary law, or only from the opposition between two arbitrary laws; for from thence arises an infinite number of all these sorts. And it is easy to perceive, that, as it is necessary, for deciding of questions, to reason from the nature and spirit of the rules, from their use, their bounds, their extent, and from other the like views, so we cannot found our reasonings, nor form our decisions, but upon the natural principles of justice and equity.

#### XXIX. *Two Sorts of Natural Rules: Examples both of one and the other Sort.*

We must likewise observe concerning this necessity of the study of the natural laws, that they are of two sorts. One is, of those of which the mind is convinced without any reasoning, by the evidence of their truth, such as these rules: that covenants are in the place of laws to those who make them; that the seller ought to warrant what he sells; that the depositary ought to restore the thing deposited. And the other is, of those rules which have not this evidence, and of which the certainty is not discovered except by some reasoning, which shows their connection with the principles on which they depend. We shall see by examples this second sort of rules, and the necessity of study for the knowing of them.

If a man who has no children makes a donation of his goods, and afterwards has children, it is a rule that the donation doth not any longer subsist, and the equity of this rule is very evi-

dent. For nature destines to the children the goods of their fathers; and it was understood, that he who made the gift when he had no children would not have given if he had had any, or been in hopes to have any; and this made a tacit condition in his donation, that it should not subsist but in case he had no children. But if it so falls out, that the children born after the donation die before the donor has done any thing to revoke it, there arises a doubt, to know if the donation is confirmed by this death of the children, or if it remains null. And it is not so clear that the donation is null in this case, as it is clear that it is null when the children live. For seeing the donation was revoked only in favor of the children, it may be doubted whether, this motive ceasing when the children are no longer in being, the law which annulled the donation ought to cease also, and if the donation ought not to reassume its force; or whether, on the contrary, the donation, being once annulled by the birth of the children, is not so for ever; so that the said birth of the children brings back the goods into the family, to remain therein, according to the expression of the law of the Romans which hath established the rule of the revocation of donations by the birth of children. For it is said in that law, that the goods return to the donor, who remains master of them, and may dispose of them at his pleasure.<sup>8</sup> Which seems to decide tacitly that the donation remains null: and this rule is of the number of those whose evidence is not so clear.

We shall add only a second example, out of a thousand which we meet with in the body of the laws. If two persons who are at law together accommodate their difference by a friendly agreement, nobody doubts of the necessity of executing the said agreement. And this is a rule that is understood, without any reasoning upon it. But if it happens, that, the cause being ripe for judgment, sentence is given before the parties have transacted, and that they afterwards do transact, knowing nothing of the sentence, it does not appear so clear as in the first case, whether the agreement annuls the sentence, or the sentence the agreement. For the rule in general is, that transactions ought to be executed; but in the case of a transaction about a lawsuit which was already ended by a sentence, this rule ceases; because people transact only about differences which are not de-

<sup>8</sup> Rom. viii. 17; — Eccl. i. 9, 12.

<sup>9</sup> See the fourth article of the third section of *Donations*.

cided; and no man departs from his right, except out of fear, and when there is danger of being unsuccessful in the event. Thus, in the case where the difference does not remain any longer undecided, and where there is no more uncertainty, nor danger, the ignorance under which the person lay, in whose favor sentence was given, ought not to hinder the effect which the authority of a judgment gives to truth and to justice. And thus it is that the law doth determine it in the case of sentences from which there lies no appeal. And this rule is likewise of the number of those which in themselves have not such an evidence as removes all manner of doubt.<sup>a</sup>

These two examples show plainly enough the difference between the rules whose equity appears at first view without any reasoning, and those of which the equity is discovered only by some reflections. But although it be true in these examples, and in an infinite number of the like nature, that in the cases where natural equity doth not form so evidently the decision, it would seem as if one might take indifferently for the rule either the one or the other of the contrary opinions, and that therefore the rule which is preferred ought not to be looked upon as a natural law, but only as an arbitrary law; yet it is most certain, that all the rules of this kind, of which there is so great a number in the Roman law, and which determine to one of the opposite opinions by some principle of natural equity, are considered, not as laws purely arbitrary, but as natural laws, and such in which the reason of equity hath prevailed, and formed the decision. And thus we look upon all these laws as written reason, that is to say, that which reason makes choice of among the opposite sentiments. And we reckon only those to be pure arbitrary laws, whose dispositions are such, that it cannot be said, that a law different from them would be contrary to the principles of equity. Thus, for example, it is altogether indifferent to natural equity, whether for the entry of new vassals any thing be due to the lord of the fee under the name of relief, or any other right of the like nature, or that there be nothing due to him besides bare homage; that the fines for alienations be due only in sales, or that they be due for all sorts of acquisitions; that there be a dowry settled by custom, without any contract, or that there be none, unless it be agreed upon. And

<sup>a</sup> See the seventh article of the second section of *Transactions*

likewise these sorts of things, and others of the like nature, are differently regulated in divers countries, and it cannot be pretended in any one of them, that these rules are natural laws, and they are received only upon the bare authority of usage, and as laws purely arbitrary; but the rules which are drawn from the decisions collected in the body of the Roman laws, such as those which we have just now taken notice of, have the character of natural laws, by reason of the principles of natural equity from whence they are deduced.

XXX. *Natural Laws which seem sometimes as if they were abolished.*

It is likewise necessary to be observed, in relation to the distinction between natural laws, and positive, or arbitrary laws, that there are some rules of the natural law which seem to be sometimes abolished by contrary laws, as if they were only arbitrary laws. Thus, the law which calls to the succession of a father the daughters in conjunction with the sons, is a law entirely natural, and yet it was not observed in the law which God himself gave to the Jews; for by it daughters did not succeed to their fathers, when there were males. And it was a question worthy of being decided by God himself, whether daughters who had no brothers might succeed to the estate of their fathers. And God commanded, that in this case they should succeed.<sup>1</sup>

But although it would seem by this law which thus excluded daughters, that it may be said, either that the law of nature does not require that daughters should succeed, or that the law of nature may be abolished, it is nevertheless true, that it always has been, and always will be, a natural law, that daughters, who are of the number of children, should succeed to their fathers; and likewise always true, that the natural law cannot be abolished. But another principle of natural equity did exclude the daughters from succeeding with their brothers, and that without any injustice to the daughters. For in lieu of the right of succession, the law gave them a portion for marrying them,<sup>1</sup> and this condition of the daughters had nothing in it but what was just, and even natural, because that with their portion they were able to match with a family in which they might find the advantages which they left to their brothers. And in the

<sup>1</sup> Numb. xxvii.

<sup>1</sup> Exod. xxi. 9, xxii. 17.



kingdom of France there are some customs, where the daughters who are married by their fathers, even without a marriage portion, are deprived of all manner of right to the succession, although they do not renounce it, unless the right of succession be expressly reserved to them; because the fathers having settled their daughters in other families by marriage, this establishment is to them instead of all patrimony, and of all share in the successions. Thus, the laws which exclude the daughters when there are sons do not derogate from the natural law, which calls the daughters to successions; because they give them, in lieu of the right of succession, another advantage which is equivalent to it.

### XXXI. *Different Effects of some Natural Laws.*

We must, in the last place, make this remark on the subject of the laws of nature, that there are some of them, which, although they be owned for such in all governments, have not, however, everywhere the same extent and the same use. Thus there is no government, wherein it is not owned to be agreeable to the law of nature that brothers, and other collateral relations, should succeed to those who leave behind them neither descendants nor ascendants; but this right is very differently considered in divers places. For in the provinces of the kingdom of France which are governed by their own customs, the right of the heirs of blood is so much considered as a natural law, that the said customs do not own any other heirs, and they appropriate to them a part of the estate, greater in some places, and lesser in others, but which in all these customs is called the inheritance which cannot be taken from them; so that only the remainder of the estate, which is over and above the portion reserved to them by custom, can be disposed of to their prejudice. But in the other provinces, which have for their custom the written law, that is, the Roman law, every one has power to deprive his collateral relations, and even his brothers, of all his goods, and to give them to strangers. So that the law of nature, which calls the heirs of blood to successions, loseth its use in these provinces, when they are excluded by a testament, and hath its effect only in the successions of persons who die intestate.

It appears by the extent which these customs give to the natural law, which calls the collateral relations to inheritances, and



by the bounds which are set to it by the written law, that they have not in all places the same idea of the natural law which calls collaterals to successions; whereas people have everywhere the same idea almost of all the other rules of the law of nature, and attribute to them the same effect. As, for instance, all governments receive alike the natural rules of equity, which oblige the heirs to acquit the burdens of the succession, and contractors to perform their covenants, and others of the like nature.

This difference between the uniform use in all places of almost all the natural rules of equity, and the diverse ways of extending or limiting that natural rule which calls collaterals to successions, proceeds from this, that there is no rule which leads to any thing contrary to those sorts of rules which are observed alike in all places; whereas there is a rule which leads to the restraining of that which calls the collaterals to successions. For the laws permit people to make dispositions of their goods by a testament; and the use of this liberty doth necessarily diminish the right of the heirs of blood. And since nature doth not fix this liberty to a certain point, the written law hath extended it to the power of disposing of all one's goods, to the prejudice of his collateral relations, and the customs have restrained it to a certain portion of the goods; although the same customs allow the depriving of the collateral relations of all share in the inheritance, by deeds of gift executed in the lifetime of the donor; because there is this difference between donations executed in the lifetime of the donor, and dispositions made in view of death, that in these the heir is only divested of the goods disposed of, and not the testator; whereas in the former, the donor strips himself of what he gives away.

### XXXII. *Laws Divine and Human, Natural and Positive.*

To finish this distinction of immutable laws and of arbitrary or mutable laws, it remains only to be observed, that this distinction includes that of divine and human laws, and likewise that of natural and positive laws; or rather, that these three distinctions make but one, for there are no natural and immutable laws but what come from God; and the human laws are positive and arbitrary laws, because men may enact them, change them, and abolish them.

XXXIII. *Remark on the Words "Divine Laws."*

Some may perhaps think, that the divine laws are not all of them immutable; seeing God himself hath abolished many of those which he gave to the Jews, because they were not agreeable to the state of the new law. But it is still true, that those very laws were immutable by man, and that the divine laws which regulate our present state are no more susceptible of any change. Concerning which it is to be remarked, that the dignity of this name of divine laws is reserved to those which concern the duties of religion, such as the two fundamental laws, the Decalogue, and all the precepts contained in the Holy Scriptures about faith and manners: and as to the detail of the immutable rules of equity, which relate to matters of contracts, testaments, prescriptions, and other matters treated of in the civil laws, although these rules derive their justice from the divine law, which is the fountain of them, yet they have only the name of natural laws, or of the law of nature; because God has engraven them on our nature, and hath made them so inseparable from reason, that it alone is sufficient for understanding them, and that even those persons who are ignorant of the first precepts, and of the spirit of the divine law, know these natural rules and make laws of them to themselves.

XXXIV. *Distinction of Laws of Religion, and of Laws of Policy.*

After this first distinction of laws immutable, and of arbitrary laws, we must observe a second, which comprehends likewise all the laws under two other ideas: one of the laws of religion, and the other of the laws of civil policy: and these are two distinctions which must not be confounded; as if all the laws of religion were immutable, and all the laws of policy were only arbitrary laws. For there are in religion many arbitrary laws, and in policy many laws that are immutable. Thus, there are in religion laws which regulate certain ceremonies relating to the external part of divine worship, or some points of church discipline, which are arbitrary laws, enacted by the authority of the spiritual powers: and there are in policy immutable laws, such as those which enjoin obedience to the supreme powers; those which command to give to every one his due, and to do hurt to no man; those which command honesty, sincerity, fidel-

ty, and which condemn deceit and cheating; and an infinite number of particular rules, which depend on the first fundamental laws. So that it is common both to religion and to policy, to have both the use of immutable laws, and that of arbitrary laws; and we must therefore distinguish, by other views the laws of religion, and those of policy.

The laws of religion are those which regulate the conduct of man by the spirit of the two primary laws, and by the inward dispositions which incline him to all his duties towards God, and towards himself, and towards others, either in private affairs, or in what concerns the public order. And this takes in all the rules of faith and manners, and also all those relating to the external part of divine worship and to church discipline.

The laws of policy are those which regulate the external order of society among all men, whether they know or are ignorant of religion; whether they observe the laws thereof, or have them in contempt.

*XXXV. Religion and Policy have Laws in Common, and each of them hath its proper Laws. — Examples of these Three Sorts.*

We may be able to judge by these first remarks about laws of religion, and laws of policy, that they have rules which are common to them both, and that both the one and the other have some rules that are peculiar to each of them.

Thus, the laws which command obedience to the natural power of parents, and to the authority of the spiritual and temporal powers, according to the extent of their ministry, those which enjoin sincerity and fidelity in commerce, those which forbid murder, theft, usury, fraud, and other laws of the like nature, are laws of religion, because they are essential to the two primary laws; and they are also laws of policy, because they are essential to the order of society; so that they are common both to religion and to policy. But the laws which concern faith, and the inward disposition of the mind, and those which regulate the ceremonies of divine worship, and the discipline of the church, are laws peculiar to religion: and the laws which regulate the formalities of testaments, the time of prescriptions, the value of the public money, and others of the like nature, are laws proper to policy.

**XXXVI. *The Laws common to Religion and Policy have their different Ends in the One and in the Other.***

But it is to be remarked, in relation to the laws which are common to religion and to policy, that they have in every one of these states a different use from what they have in the other. For in religion these laws oblige to an upright intention in the heart, which may not only fulfil the letter of the law outwardly, but which may observe the spirit and design of it inwardly: and in policy, one satisfies the laws by observing them outwardly, and attempting nothing against their prohibitions. So that although religion and policy have their common principle in the divine appointment, and their common end of regulating and governing men, yet they are distinguished by the means which they use for accomplishing their end, in that religion regulates the inward disposition of the mind, and the manners of men, in order to move them to their duties; and policy exerciseth its ministry only over the external actions of men, without meddling with the internal disposition of the mind.

**XXXVII. *Difference between the Arbitrary Laws of Religion, and the Arbitrary Laws of Human Policy.***

We must also observe this difference between the arbitrary laws of religion, and the arbitrary laws of civil policy, that these are commonly called human laws, because they are laws which men have established, and because it is human reason that is the principle of them. But although the arbitrary laws of religion be also established by men, yet they are not called human laws, but canons and ecclesiastical constitutions, or laws of the church, because they are grounded on the direction of the holy spirit which governs the church.

It is not necessary to enlarge further here on this distinction of the laws of religion and of the laws of civil policy. It remains only that we consider the general order of the laws of temporal policy, that we may see what rank the civil laws have therein.

**XXXVIII. *Laws of Temporal Policy.***

The laws of temporal policy are of many sorts; according to the different parts of the order of society, of which they are the rules.

XXXIX. *The Law of Nations.*

\* Seeing all mankind make one universal society, which is divided into divers nations which have their separate governments, and seeing nations have with one another different intercourse and communications, it was necessary that there should be laws to regulate the order of these communications, both for the princes among themselves, and for their subjects; which takes in the use of embassies, negotiations, treaties of peace, and all the ways in which princes and their subjects carry on their intercourse, and keep up their engagements with their neighbours. And even in wars, there are laws which regulate the manner of declaring war, which moderate acts of hostility, which maintain the use of mediations, of truces, of suspensions of arms, of capitulations, of the safety of hostages, and other the like matters.

All these things could not be regulated but by some laws: and seeing nations have no authority to impose laws one upon another, there are two sorts of laws which serve as rules to them. One is of the natural laws of humanity, hospitality, fidelity, and all those which depend on these first laws, and which regulate the manner of behaviour which the people of different nations are to use towards one another in times of peace and of war. And the other is that of the regulations which nations agree on by treaties, or by usages which they establish, and which they mutually observe. And the infractions of these natural laws, of these treaties, and of these usages, are restrained by open wars, by reprisals, and by other ways suited to the ruptures and to the attempts.

These are the laws that are common between nations, which may be called, and to which we commonly give the name of, the law of nations; although this word is taken in another sense in the Roman law, in which under the law of nations are also comprehended contracts, such as sales, letting to hire, partnership, a deposit, and others; and that for this reason, because they are in use in all nations.<sup>m</sup>

The universal policy of society, which regulates the ties and engagements between nations by the law of nations, regulates every nation by two sorts of laws.

<sup>m</sup> L. 5, D. de just. et jur.; — § 2, in fin. Inst. de jur. nat. gent. et civ.

### **XI. The Public Law.**

The first is, of those laws which relate to the public order of the government, such as the laws denominated laws of the state, which regulate the manner in which sovereign princes are called to the government, whether it be by succession or election; those which regulate the distinctions and the functions of the public offices for the administration of justice, for the government of the army, for the management of the public revenue, and of those offices which are called municipal offices; those which concern the rights of the prince, his demesnes, his revenues; the government of cities, and all the other public regulations.

### **XLII. Private Law, or that which regulates the Affairs between Private Persons.**

The second is, of those laws which concern the private property of persons, and to which we give the name of private law; which comprehends the laws regulating covenants, contracts of all kinds, guardianships, prescriptions, mortgages, successions, testaments, and other matters of the like nature between private persons.

### **XLIII. The Civil Law.**

It is to these laws which regulate matters between private persons, and the differences which may arise from them, that most people appropriate the name of the civil law. But this idea would take in also under the name of the civil law many matters belonging to the public law, to the law of nations, and even to the canon law; since it often happens that there arise differences and disputes between private persons in matters of the public law; as, for example, in the execution of offices, in the levying of the public taxes, and in other the like matters; and that such disputes between private persons happen also in matters belonging to the law of nations, by the consequences of wars, reprisals, treaties of peace; and even in ecclesiastical matters, as touching church benefices, and others. And, in fine, the distribution of justice to private persons implies the use of many laws, which are general regulations of the public order, such as those which establish punishments for crimes, those which regulate the order of judicial proceedings, the duties of

judges, and their different jurisdictions. So that it is a different matter to frame a just idea, which may distinguish nicely and precisely the civil law from the public law, and from the other kinds of laws.

#### XLIII. *Divers Ways of conceiving the Laws which compose the Civil Law.*

It is this mixture of all these several sorts of laws which diversifies the ways of distinguishing them, and which renders it difficult to reconcile the sense which is given in the Roman law to these words *civil law*, with the meaning which we ascribe to them; as it is also difficult to reconcile the ideas which we commonly have of the law of nature and of the law of nations, with those ideas which the distinctions in the Roman law give us of them.

#### XLIV. *Division of Laws in the Roman Law.*

The Roman law distinguished laws into the public law, which concerned the state of the republic, and private law, which related to the rights of private persons.<sup>a</sup> This private law they divided into three parts; the first was of the law of nature, the second of the law of nations, and the third of the civil law.<sup>b</sup> The law of nature they reduced to that which is common to men and to beasts.<sup>c</sup> They extended the law of nations to all the laws that are common to all people, and under it they comprehended the contracts which are in use in all nations:<sup>d</sup> and they restrained the civil law to the laws which are peculiar to one people,<sup>e</sup> which must exclude from the civil law contracts, and the other matters which are common to all people, and which were comprised in the law of nations.

#### XLV. *Divers Ways of dividing the Laws under Divers Views.*

It appears that this distinction, in the manner it is explained in the Roman law, seems different from our usage, which does not place in the number of the laws to which we give the name of the law of nations those which regulate the matters of

<sup>a</sup> L. 1, § 2, D. de just. et jur.; — § 4, Inst. cod.

<sup>b</sup> L. 1, § 2, in fin. D. de just. et jur.; — § ult. Inst. cod.

<sup>c</sup> L. 1, § 3, D. de just. et jur.; — Inst. de jure nat. gent. et civ.

<sup>d</sup> L. 5, D. de just. et jur.; — § 2, Inst. de jure nat. gent. et civ.

<sup>e</sup> L. § 1 et 2, Inst. de jure nat. gent. et civ.; — b 2, D. de just. et jur.

covenants; and which does not restrain the law of nature to that idea which is given of it in the Roman law. But since there is nothing more arbitrary than the ways of dividing and distinguishing things which may be considered under divers views, and since the different distinctions may have their several uses, provided we do not conceive false ideas of that which is essential to the nature of the things, it is of no great moment to take up time in making the reflections which might be made on these different ways of distinguishing the laws; and it sufficeth to have made the remarks which are most material on their nature, and their characters, and to have given these general ideas of them, by which every one may be able to form unto himself the distinctions which shall appear to him to be most just and most natural. And as to the idea which we ought to form of the civil law, it sufficeth to observe, that we never restrain the meaning of the word *civil* to the laws peculiar to one city, or to one people; neither do we extend it to all the laws which regulate the matters from which there may arise differences between private persons. As, for instance, we distinguish the civil law from the canon law, and even from the customs and ordinances: and the signification of the term *civil* seems to be fixed to the laws which are collected in the body of the Roman law, to distinguish them from our other laws. And we likewise give simply the name of civil laws to the books of the Roman law; and it is by this name that they are entitled, although this word is restrained in the same books to another sense, as has been just now remarked. Thus, the civil law in this sense will comprehend many matters of the public law, and even matters ecclesiastical, which are collected in the books of the Roman law: and it will likewise include every thing contained in those books which is not in use with us, and which nevertheless is a subject proper to be studied by those who apply themselves to the study of the Roman law, because of the application that may be made of such matters to those which are in use with us.

#### XLVI. *Written Law. — Customs.*

It remains only that we take notice of one more distinction of laws, which is that which is commonly made into written laws and customs. By the written law is meant the laws that are set down in writing; and in France this name is given particularly to the laws that are written in the body of the Roman law.



Customs are the laws, which were not originally written, but which have been established, either by the consent of a people, and by a sort of agreement to observe them, or by an insensible usage which has given them the authority of laws.

We shall see in the thirteenth chapter what are the subject-matters of all the kinds of laws, in what manner soever they are distinguished, and what are the matters which we have chosen out from among them to explain in this book: and we shall lay down a plan of them in the fourteenth chapter.

*XLVII. Two Sorts of Principles: One, of those which may be reduced into Rules; and the other, of those which cannot be fixed into Rules.*

Before we make an end of this subject of the nature and spirit of laws, we must observe one difference which distinguishes the use of some of the principles that have been explained from that of others, and which consists in this, that there are many of these principles which are of such a nature, that it is easy and necessary to reduce them into fixed rules, which may be easily applied; whereas the others cannot be reduced into such rules.

These principles, for instance, that arbitrary laws are as facts which people are naturally ignorant of, and that it is not permitted to any one to be ignorant of the natural laws, are two truths which may be reduced into two fixed rules, which may be easily applied. One, that arbitrary laws are not binding, and have not their effect, till after they have been promulged: and the other, that natural laws have their effect without any promulgation.

But there are other principles, which cannot be reduced in the same manner into fixed rules, that may be easy of application. Thus, for example, these principles, — that we must observe in questions what are the causes from whence the difficulties arise; that we ought to discern the rules by which the decisions are to be formed, to weigh and consider in every one of them its use, and the bounds or extent which it ought to have, — cannot be reduced into certain rules, which may fix and determine the decisions that are to be given. And there are many other principles, of several sorts, which it is not easy to reduce into rules, and to fix the use of them, as it will be easy to perceive, by the bare reading of these principles in the places where they have been mentioned. But they have nevertheless their use, by the differ-

ent views which they may give in the particular application of all the rules.

**XLVIII** *Remark on these Two Sorts of Principles.— Transition to the following Chapter.*

. This difference between the principles from whence we may gather certain rules, and those which cannot be fixed in the same manner, hath made it necessary to add here some reflections on a part of the principles which have been established, in order to discover in them truths, from which may be formed many rules necessary for the right understanding of the Roman laws, and for making a just application of them. And because these rules are an important part of the civil law, and are placed in the first title of the preliminary book, where they ought to be free from these reflections which show their connection with the principles on which they depend, these reflections shall be made the subject of the following chapter.

And as to what concerns that other kind of principles, which cannot be reduced into rules, it sufficeth to remark in general, that the right use of these sorts of truths ought to depend on good sense, and understanding, and on the several views which may be had from study, from experience, and from the different reflections on the facts and circumstances from whence the difficulties that are to be regulated do arise. And it is in this use of the judgment, and in the clearness of the understanding, enlightened by all these views, that the most essential part of the science of law doth consist; which science is nothing else but the art of discerning justice and equity.\*

\* L. 1, D. de iust. et jure.

## CHAPTER XII.

REFLECTIONS ON SOME REMARKS IN THE PRECEDING CHAPTER,  
WHICH ARE A FOUNDATION OF SEVERAL RULES TOUCHING THE  
USE AND INTERPRETATION OF LAWS.

*I. Natural Laws regulate both the Time past and the Time to come, although never promulged, and the Arbitrary Laws regulate only the Time to come, after Publication.*

We have seen that the natural laws are truths which nature and reason teach men, that they have of themselves the justice and authority which oblige people to obey them, and that nobody can pretend ignorance of them: that, on the contrary, the arbitrary laws are as facts naturally unknown to men, and which are not binding till after they have been promulged. From whence it follows, that natural laws regulate both the time to come and the time past.<sup>a</sup> But arbitrary laws do not meddle with the time past, which is regulated by the preceding laws, and have their effect only for the time to come;<sup>b</sup> and it is to give them this effect that they are put down in writing, that they are promulged, that they are recorded, to the end that nobody may pretend ignorance of them.<sup>c</sup> And because it is not possible to make them known to every one in particular, it sufficeth to give them the force of laws, that they be made known to the public. For then they become public rules which every body is bound to observe. And the inconveniences which may happen to some particular persons by reason of their not knowing them, do not balance their usefulness.

*II. When New Laws have a relation to Old ones, they are to be interpreted one by another.*

But although arbitrary laws have not their effect except for the time to come, yet if what they command appears to be conformable to the law of nature, or to some arbitrary law that is in force, they have, with respect to the time past, the effect which their conformity and agreement with the law of nature,

<sup>a</sup> See the twelfth article of the first section of the *Rules of Law*.

<sup>b</sup> See the thirteenth and fourteenth articles of the same section.

<sup>c</sup> See the ninth article of the same section.

and the ancient arbitrary laws, can give them.<sup>d</sup> And they serve likewise to interpret them, in the same manner as ancient rules are useful in the interpretation of such as are newly established. And it is after this manner that the laws mutually support and explain one another.<sup>e</sup>

### III. *Presumption for the Usefulness of a Law, notwithstanding the Inconveniences of it.*

We have seen that arbitrary laws, whether they be established by those who have the right to make laws, or by some usage and custom, are always founded upon some usefulness, either to prevent or put a stop to inconveniences, or upon some other view of the public good: from whence it follows, that although the said laws may cause other inconveniences, in the place of those which they have removed, and that sometimes we are ignorant what were the motives of enacting these sorts of laws, and wherein their usefulness consists, yet we ought still to presume that the law which is in force is useful and just, until it be repealed by another law, or abolished by disuse.

### IV. *Customs and Usages are the Interpreters of Laws.*

We have seen that customs and usages serve as laws: <sup>a</sup> from whence it follows, that if customs and usages have the force of laws, with much more reason are they to be used as rules in the interpretation of other laws. And there is no better rule for explaining obscure and ambiguous laws, than the manner in which they have been interpreted by custom and usage.<sup>b</sup>

### V. *Disuse abolishes Law and Customs.*

We have shown that the authority of customs and usages is founded on this reason, that it ought to be presumed that what has been observed for a long time is useful and just;<sup>c</sup> from whence it follows, that if any law, or custom, hath been a long time in disuse, it is abolished.<sup>d</sup> And as its authority was founded upon the long usage, so the same cause can take it

<sup>a</sup> See the fourteenth article of the first section of the *Rules of Law*.

<sup>b</sup> See the ninth and eighteenth articles of the second section of the same title.

<sup>c</sup> See the thirteenth article of the same section.

<sup>d</sup> See the tenth and eleventh articles of the first section.

<sup>e</sup> See the eighteenth article of the second section.

<sup>f</sup> See the tenth article of the first section.

<sup>g</sup> See the seventeenth article of the first section.

away. For it shows that what has ceased to be observed is no longer useful.

*VI. The Laws and Customs of the Neighbouring Places serve as Examples and Rules.*

It follows also from the same presumption, which makes us judge that what has been long observed is useful and just, that if in some provinces, or other places, they want rules for certain difficulties in matters which are there in use, but which are not so minutely regulated there as to determine these sorts of difficulties, and it appear that the said difficulties are regulated in other places, where the same matters are likewise in use; it is natural to follow the example of those places, and especially that of the chief towns. Thus, we see in the Roman law, that the provinces conformed themselves to the usage of Rome.<sup>m</sup>

*VII. We must judge of the Meaning and Intent of a Law by its whole Tenor.*

We have seen that it is by the spirit and intendment of the laws that we are to understand and apply them: that, in order to judge aright of the meaning of a law, we ought to consider what its motive is, what are the inconveniences against which it provides, and what is the usefulness which may redound from it; the relation it hath to ancient laws, the changes it makes in them; and to make the other reflections, whereby we may be able to apprehend rightly its meaning: from whence it follows, in the first place, that, in order to find out by all these views the intention and spirit of the laws, we must examine in them what it is they set forth, and what it is they decree, and always judge of the sense and meaning of the law by the whole series and tenor of all its parts, without curtailing any thing in it.<sup>n</sup>

*VIII. We must adhere rather to the Sense of the Law, than to what the Terms of it may seem to carry contrary to it.*

It follows also from this remark on the design and motive of the law, that, if it happens that some terms or some expressions of a law appear to have a different sense from what is otherwise evidently marked by the tenor of the whole law, we must

<sup>m</sup> See the twentieth article of the second section of the Rules of Law.

<sup>n</sup> See the tenth article of the same second section.

adhere to this true sense, and reject the other, which appears from the terms, and which is found to be contrary to the intent of the law.\*

### IX. *To supply the Defect of Expression, by the Intendment of the Law.*

It follows likewise from the same remark, that, when the expressions of laws are defective, we must supply them, so as to make up the sense of the law according to its spirit and intendment.

### X. *Laws which are interpreted favorably.*

This is likewise another consequence of the same remark on the spirit of laws, that some of them are to be interpreted in such a manner, as to give them the whole extent they are capable of, without violating justice and equity; and others, on the contrary, are to be restrained to a more limited sense. Thus, the laws which relate in general to what is of natural liberty, those which permit all sorts of covenants, and all those which favor equity, are to be interpreted with all the extent that can be given them, without encroaching upon other laws, or upon good manners.† For which reason, the causes which the laws favor in this manner are called favorable causes.

### XI. *Laws which are strictly interpreted.*

But the laws which derogate from this liberty, those which prohibit what of itself is not unlawful, those which derogate from common right, those which make exceptions, which grant dispensations, and others of the like nature, ought to be restrained to the particular cases which they regulate, and to what is expressly included in their dispositions.‡

### XII. *Equity. — Rigor of the Law.*

We may place among these different interpretations, which give some extent to laws, or which restrain them, the rules which

\* See the third and twelfth articles of the second section of the *Rules of Law*. See in that twelfth article the cases where it is necessary to have recourse to the prince for the interpretation of the law.

† See the eleventh article of the second section.

‡ See the fourteenth article of the second section; — l. 1, *D. de constitucion.*

§ See the fifteenth article of the second section.

concern the temperaments of equity, which may be used on some occasions, and the rigor of the law, which must be followed on others.

But we shall not stop here to give examples of these several interpretations, nor to explain the difference between equity and the rigor of the law, and that which concerns the use of the one and the other. This detail shall be explained in its proper place. We shall only observe touching these sorts of causes which are commonly called favorable causes, such as those of widows, orphans, churches, marriage portions, testaments, and others of the like nature, that this favor ought always so to be understood, as not in the least to prejudice the interest of third persons, and that the favor of these sorts of causes is not to be extended beyond the bounds of justice and equity.

### XIII. *Interpretation of the Benefits of Princes.*

Upon the same principle of the favorable interpretation of some laws, and the strict interpretation of others, doth depend the rule of two different interpretations of the will of princes, in the gifts and privileges which they grant to some persons. For when the said gifts are such, as that we may give to them a full and entire extent, without any prejudice to other persons; they are always interpreted in favor of the person whom the prince had a mind to honor with this benefit, and an extent is given to it suitable to what the liberality that is natural to princes does demand. But if it be such a gift and privilege as cannot be interpreted in this manner without prejudice to other persons, it must be restrained to what may be granted them without prejudice to others.

### XIV. *Divers Effects, or Uses, of Laws, to ordain, to prohibit, to permit, to punish.*

We have seen what are the foundations of the justice and authority of laws, and that, seeing they are the rules of the order of society, they ought to diversify the effects of that authority, according to the several uses that are necessary for forming that order, and for maintaining it. This is the reason why many laws ordain, some prohibit; why others permit, and why all

\* See the fourth, fifth, sixth, seventh, and eighth articles of the second section of the *Rules of Law*.

† See the seventeenth article of the second section.

punish and restrain those who transgress their different dispositions; whether it be that they do not accomplish what the laws prescribe, or that they do what the laws forbid, or that they transgress the bounds of what they permit. And according to the ways in which their dispositions, and their design, are violated, they deprive those of their effects who do not fulfil what they enjoin; they punish those who do what they forbid, or who do not that which they command; they annul that which is done contrary to the order which they prescribe; they repair the consequences of their infractions; they take vengeance for every thing that violates their dispositions; and, in fine, they maintain their authority by all the ways that are necessary for preserving order.\*

*XV. Laws restrain not only what is directly contrary to their Dispositions, but also what is indirectly against their Intention.*

It follows likewise from the same remark on the justice and authority of laws, that they restrain not only what is directly opposite to their express dispositions, but also what is indirectly contrary to their intention. And whether it appear that both the spirit and letter of the law be violated, or that only the spirit of the law be transgressed, and the letter of it seemingly observed, the transgressor does, nevertheless, incur thereby the punishment.†

*XVI. Laws are made for what happens constantly, and not for one single Case.*

It is also another consequence of laws being the rules of the universal order of society, that no law is made to serve only for one person, or for one case, or for one singular and particular fact; but they provide in general for what may happen, and their dispositions respect all the persons, and all the cases, to which they extend.‡ And therefore the wills of princes, which are limited to particular persons, and to singular facts, such as a pardon, a gift, an exemption, and others of the like nature, are favors, concessions, privileges, but not laws. And although very often they be singular cases which are the motives of new laws,

\* See the eighteenth and twentieth articles of the first section of the *Rules of Law*.

† See the nineteenth article of the first section.

‡ See the twenty-first and twenty-second articles of the first section.



yet they do not regulate even those very cases which have given occasion to the said laws, and which were otherwise regulated by preceding laws; but they only take care to regulate for the future cases like unto those which gave rise to them. Thus, in France, the edict about mothers, and that about second marriages, have provided against the inconveniences to come, and the preceding cases have been regulated according to the dispositions of the laws that were in force before that.\*

### XVII. *Extent of the Laws, according to their Design.*

Lastly, it is another consequence of the preceding remark, that, since laws are general rules, they cannot regulate the time to come, so as to make express provision against all inconveniences, which are infinite in number, and that their dispositions should express all the cases that may possibly happen; but it is only the prudence and duty of a lawgiver to foresee the most natural and most ordinary events, and to form his dispositions in such a manner as that, without entering into the detail of the singular cases, he may establish rules common to them all, by discerning that which may deserve either exceptions or particular dispositions.\* And next it is the duty of the judges to apply the laws, not only to what appears to be regulated by their express dispositions, but to all the cases where a just application of them may be made, and which appear to be comprehended either within the express sense of the law, or within the consequences that may be gathered from it.

### XVIII. *There are Rules which are general and common to all Matters, others common to several Matters, and others peculiar to one.*

We have seen that all the laws derive their source from the two primary laws, that many depend on others of which they are consequences, and that all of them regulate, either in general or in particular, the different parts of the order of society, and matters of all kinds. From whence it follows, that the laws are the more general the nearer they approach to the first two fundamental laws, and the more they descend to particulars, they are the less general. Thus, some laws are common to all sorts of

See the thirteenth and fourteenth articles of the first section of the *Rules of Law*.  
See the twenty-first and twenty-second articles of the first section.

matters, such as those which enjoin honesty and sincerity, and which forbid deceit and fraud, and others of the like nature. Others are common to many matters, but not unto all. Thus, this rule, that covenants are in place of a law to those that make them, agrees to sales, exchanges, letting and hiring, transactions, and to all the other kinds of covenants, but has no relation to the matter of guardianships, nor to that of prescriptions. Thus, the rule of rescission, upon account of the party's being damaged in more than the half of the just price, which takes place in the alienation of lands by a sale, doth not take place in an alienation made by a transaction.<sup>b</sup>

### XIX. *The Importance of distinguishing these Three Sorts of Laws.*

It follows from this remark, that it is of importance, in the study and application of the laws, to observe and to distinguish the rules which are common to all matters without distinction; those which extend to several matters, but not unto all; and those which are peculiar only to one; that we may avoid falling into the error, to which many persons are liable, of extending a rule that is peculiar to one matter to another, where it has no use, and even where it would be false. Thus, for example, we find this rule in the Roman law, that in ambiguous expressions we must chiefly consider the intention of the person who speaks;<sup>c</sup> this indefinite rule being found in a title of several rules concerning all matters, and not pointing out what matter it properly belongs to, it seems to be general and common to all: and if we apply it indifferently to all matters, we shall draw the same inference from it in contracts as in testaments, where we are to interpret the ambiguous expression by the intention of the person whose will it is intended to explain. However, this application, which will be always just in testaments,<sup>d</sup> will be often found false in contracts, for in testaments it is only one person alone who speaks, and his will ought to serve as a law. But in covenants, it is the intention both of the one and the other party which is the law common to both. Thus, the intention

<sup>b</sup> See that distinction in the fifth article of the first section of the *Rules of Law*.

<sup>c</sup> In ambiguis orationibus, maxime sententia spectanda est ejus, qui eas protulisset. *L. 90. D. de reg. jur.*

<sup>d</sup> It is remarkable that this 90th law, *D. de reg. jur.*, above cited, is taken out of the treatise of Mecian about devises in trust.

of the one party ought to answer to that of the other, and it is necessary that they understand one another, and that they agree together. And according to this principle, it often happens that, it is not by the intention of the person who speaks that the ambiguous clause is to be interpreted; but rather by the reasonable intention of the other party. Thus, in a sale, if the seller hath made use of an ambiguous expression concerning the qualities of the thing sold; as if, in selling a house, he said that he sold it with its services, without distinguishing whether they be services which the house owes, or which are due to it; and the house is found to be subject to a service which was not known, such as a right of passage, a service of not raising a building higher, or other of the like nature, the great inconveniency of which would have either prevented the buyer from buying at all, or from giving so great a price for it, if he had known of the service; this ambiguity of the expression of the seller will not be interpreted by his intention, but by the intention of the buyer, who had no reason to imagine that the house was subject to any such service. And this seller shall be bound for all the effects of warranty, pursuant to the rules of this matter.\*

## XX. *Discernment of the Exceptions.*

We have seen that some laws are so general, and so certain everywhere, that they do not admit of any exception; and, on the contrary, that there are many laws to which there are exceptions. It follows from this rule, that we must not indifferently apply the general rules to all the cases that seem to be comprehended within their dispositions, for fear we should extend them to cases which are excepted from the rule. And this makes it necessary to know the exceptions.

## XXI. *Two Sorts of Exceptions, Natural and Arbitrary.—Examples.*

It is material to observe, in reference to exceptions, that there are two sorts of them: those which are made by arbitrary laws, and those which are made by natural laws. Thus, it is an arbitrary law in the Roman law which excepts military testa-

\* See the fourteenth article of the second section of *Covenants*; the fourteenth article of the eleventh section of the *Contract of Sale*; the tenth article of the third section of *Letting and Hiring*.

† See the sixth, seventh, and eighth articles of the first section of the *Rules of Law*.

ments from the general rules concerning the formalities of testaments; and it is also another arbitrary rule, according to the usage of France, that the rescission of a sale, on account of lands being sold for less than half of the true value, does not take place in sales made publicly by order of a court of justice. Thus, it is a natural law, that we cannot enter into covenants that are contrary to the laws and to good manners; and this law makes an exception to the general rule, that we may make all sorts of covenants. And it is by another natural law, that an exception is made to the rule of the restitution of minors, in the case of such engagements as were reasonable for them to enter into, and where any prudent, discreet man would have done the same.

It is easy to perceive, that the exceptions which are made by arbitrary laws are observed and learned by bare reading, and by memory; and that it is by study that we must learn them. But the discerning the exceptions which are of the natural law does not always depend on bare reading, and it requires reasoning. For there are natural exceptions which we do not find written down in laws; and even those which are written are not always joined to the rules which they restrain. So that the knowledge of exceptions, which is so necessary, demands equally both study in general, and a particular attention to the spirit and design of the laws which are to be applied; to the end we may not encroach upon the exceptions, by giving too large an extent to the general rules.

## XXII. *Advice concerning the Use of the Rules.*

We may add, as a last remark, and as a consequence of all the others, that all the different views which are so necessary in the application of laws demand a knowledge of their principles, and of their detail; and this implies the light of good sense, accompanied with study and experience. For without this foundation one is in danger of making false applications of the laws; either by misapplying them to other matters than those to which they have a relation; or by not discerning the bounds which are set to them by exceptions; or by giving too large an extent to equity against the rigor of the law, or to the rigor against equity; or for the want of the other views which are to regulate the use of laws.

\* See the last article of the second section of the *Rules of Law*.

## CHAPTER XIII.

A GENERAL IDEA OF THE SUBJECT-MATTERS OF ALL THE LAWS:  
REASONS FOR MAKING CHOICE OF THOSE WHICH SHALL BE  
TREATED OF IN THIS BOOK.

I. *All the Subject-Matters of Laws are either of Religion or of Temporal Policy.*

As we have already seen that all the different sorts of laws are reduced to two kinds, which comprehend them all, one of the laws of religion, and the other of the laws of temporal policy; and that, of these last, some are common both to the one and the other kind; so we ought likewise to distinguish all the matters of laws into two kinds, one of the matters of the laws of religion, and the other of the matters of the laws of policy, supposing that, among all these matters, there are some of them that are common to both the kinds.

II. *Matters peculiar to Religion.*

Thus, the matters which concern the mysteries of faith, the sacraments, the inward disposition of the mind, the discipline of the church, are spiritual matters, which are proper to religion.

III. *Matters peculiar to Civil Policy.*

And the matters which relate to the formalities of testaments, to the distinctions of goods into paternal and maternal, estates of inheritance and by purchase, to prescriptions, to the right of redemption, to fees, to the community of goods between husband and wife, and others of the like nature, are temporal matters proper to civil policy.

IV. *Matters common to Religion and to Policy.*

But the matters which respect obedience to princes, fidelity in all sorts of engagements, honesty and fair-dealing in covenants and in commerce, are matters common to religion and to policy; in which both the one and the other establish laws according to their ends; as has been already observed.

I shall not here enter upon a fuller explanation of the matters which belong properly to the laws of religion; but shall proceed

to consider those of the laws of temporal policy, and to point out those that are to be treated of in this book.

#### V. *Three Sorts of Matters of Temporal Policy.*

The matters of temporal policy are of three sorts, according to the three kinds of laws of this policy which have been already mentioned; viz. the law of nations, the public law, and the private law.

#### VI. *Those of the Law of Nations.*

The matters of the law of nations, in the sense which this term has with us, as has been already remarked, are the ways by which the different intercourses and correspondences are carried on between one nation and another, such as treaties of peace, truces, suspensions of arms, sincerity in negotiations, the safety of ambassadors, the engagements of hostages, the manner of declaring and making war, the liberty of trade, and other matters of the like nature.

#### VII. *Those of the Public Law.*

The matters of the public law are those which concern the order of the government of every state, the ways of calling to the sovereign power kings, princes, and other potentates, by succession, by election; the rights of the sovereign, the administration of justice, the militia, the treasury, the different functions of magistrates and other officers, the government of towns, and others of the like nature.

#### VIII. *Those of Private Law.*

The matters of private law are the engagements between private persons, their commerces, and whatever may be necessary to be regulated among them, either for preventing of disputes, or for ending them; such as contracts and covenants of all kinds, mortgages, prescriptions, guardianships, successions, testaments, and other matters.

***FX. Remark on the Ordinances, the Customs, the Roman Law, and the Canon Law; to show what are the Matters that come within the Design of this Book.***

In order to explain what are all the matters that shall be treated of in this book, and the reasons of the choice which has

been made of them, it is necessary to make first of all a remark on the several laws that are in use in the kingdom of France. /

In France there are four different kinds of laws,—the ordinances, and the customs, which are the laws peculiar to that kingdom; and such parts of the Roman law, and of the canon law, as are there observed.

These four sorts of laws regulate in France all matters of what nature soever; but their authority is very different.

The ordinances have a universal authority over all the kingdom, and are all of them observed in all parts of the kingdom, except some of them whose dispositions respect only some of the provinces.

The customs have their particular authority; and each custom is confined to the limits of the province or place where it is observed.

The Roman law hath in the kingdom of France two different uses; and hath for each of them its proper authority.

One of these uses is, that it is observed as a custom in many provinces, and is there in the place of laws in several matters. These are the provinces of which it is said, that they are governed by the written law; and for the usage of those provinces, the Roman law has the same authority as in the other provinces their peculiar customs have.

The other use of the Roman law in France extends to all the provinces, and comprehends all matters; and it consists in this, that those rules of justice and equity which are termed the written law, because they are written in the Roman law, are observed over all the kingdom. Thus, for the second use, it has the same authority as justice and equity have over our reason.

The canon law contains a great number of rules which are observed in France, but it has likewise some which we reject. Thus, we observe all the canons which concern faith and manners, and which are taken from Scripture, from the councils, and from the fathers; and we receive of it likewise a great many constitutions which respect the discipline of the church. And by usage we have received likewise some rules of it which relate only to temporal policy. But other dispositions of it we reject, either because they are not received in use, or because some of them are contrary to the rights and liberties of the Gallican church.



*X. What these Matters are.—Reasons for the Choice that has been made of them.*

Having made these remarks, it is now easy to show what view the author proposed to himself in the choice of the matters which he thought proper to comprehend in this book, and to distinguish them from those which he thought fit to exclude.

Among all the matters which are regulated by these four sorts of laws which are in use in France, viz. the ordinances, the customs, the canon law, and the Roman law, there is a great number of them which are distinguished from all the others, in a manner which has been the reason of the choice that has been made of them.

The matters which are thus distinguished from the others are those of contracts, such as sales, exchanges, letting and hiring, loan, partnership, a deposit, and all other covenants; of guardianships, prescriptions, mortgages; of successions, testaments, legacies, substitutions; of proofs and presumptions; of the state of persons; of the distinctions of things; of the manner of interpreting laws; and many other matters, which have all of them this belonging to them in common, that the use of them is more frequent and more necessary than that of other matters.

The author considered that these matters are distinguished from all the others, not only in that the use of them is more frequent, but particularly in that their principles and their rules are almost all of them natural rules of equity, which are the foundations of the rules of the matters regulated by the ordinances and customs, and even of such matters as are not known in the Roman law. For all the matters regulated by the ordinances and customs have therein no other laws besides some arbitrary rules; so that it is upon the natural rules of equity that the principal law and decision of such matters depend. Thus, for example, in the matter of fiefs, the customs have only regulated the different conditions of them in divers places; but it is by the natural rules of covenants, and by other rules of equity, that questions touching these matters are decided. Thus, in the matter of testaments, the customs regulate the formalities of them, and what dispositions testators may or may not make; but it is by the rules of equity that the questions are decided touching the engagements of heirs or executors, the interpretation of the wills of testators, and all the other matters in which there may



be any difficulty. For, as has been already observed in another place, it is always by these rules that questions of all kinds are discussed and decided.

Since, therefore, it is in the Roman law that these natural rules of equity have been collected together, and that they are there collected in the manner which has been observed in the preface, and which renders the study of them so difficult and perplexed; it is this that engaged the author in the design of this book, and to make choice of these matters, of which the plan may be seen in the following chapter.

## CHAPTER XIV.

### A PLAN OF THE MATTERS CONTAINED IN THIS BOOK OF THE CIVIL LAW IN ITS NATURAL ORDER.

#### I. *All Matters of Law have a Natural Order.*

ALL the matters of the civil law have among themselves a simple and a natural order, which forms them into one body, in which it is easy to see them all, and to perceive with one view in what part every one hath its rank. And this order is founded on the plan of society which has been already explained.

#### II. *The Foundation of this Order.*

We have seen in that plan, that the order of society is preserved in all places by the engagements with which God links men together, and that it is perpetuated in all times by successions, which call certain persons to succeed, in the place of those who die, to every thing that may pass to successors. And this first idea makes a first general distinction of all matters into two kinds: one is of *Engagements*, and the other of *Successions*.

All the matters of these two kinds ought to be preceded by three sorts of general matters, which are common to all the others, and necessary for understanding the whole detail of the laws.

The first comprehends certain general rules which respect the nature, use, and interpretation of laws; such as those which have been mentioned in the twelfth chapter.

The second concerns the ways in which the civil laws consider and distinguish persons by certain qualities which have relation to engagements or successions; as, for example, the qualities of a father of a family, or of a son living under the father's jurisdiction, of a major or a minor, the qualities of a child lawfully begotten, or of a bastard, and others of the like nature, which constitute what is called the state of persons.

The third comprehends the ways in which the civil laws distinguish the things which are for the use of men, with respect to engagements and successions. Thus, with respect to engagements, the laws distinguish the things which enter into commerce from those which do not enter into it; such as things public and things sacred; and with respect to successions, a distinction is made of goods paternal and maternal, of estates of inheritance and those of purchase.

### III. *The General Division of the Matters of this Design into Two Parts: the First of Engagements, and the Second of Successions.*

According to this order, we shall divide all the matters of this work into two parts. The first shall be of engagements, and the second of successions. And both the one and the other shall be preceded by a preliminary book; the first title of which shall contain the general rules concerning the nature and interpretation of laws; the second shall be of persons; and the third of things.

### IV. *These two Parts are preceded by a Preliminary Book of the Rules of Law in general, of Persons, and of Things.*

As to the distinction of the matters of the first part, which is of engagements, it is to be remarked, as has already been shown in the plan of society, that engagements are of two kinds.

The first is of those which are formed mutually between two or more persons, by their will and consent; and this is done by covenants, when men engage themselves mutually and voluntarily in sales, exchanges, in letting and hiring, in transactions, compromises, and other contracts and covenants of all sorts.

The second is of such engagements as are formed otherwise than by mutual consent; such are all those which are made either by the will of one person alone, or without the will of

either of the parties. Thus, he who undertakes to manage the affair of his absent friend engages himself by his will, without the consent of the absent person. Thus, the tutor is engaged to his pupil, independently of the will of the one or the other. And there are divers other engagements which are formed without the mutual will of those who are bound by them.

All these sorts of engagements, whether they be voluntary or involuntary, have divers consequences, which are reduced to two kinds. The first is of those sorts of consequences which add to engagements, or which strengthen them; such as mortgages, the privileges of creditors, obligations in which several persons are bound each for the whole, suretyships, and others which have this character of adding to engagements, or of strengthening them.

The second kind of the consequences of engagements is of those which annul them, or which change them, or diminish them; such are payments, compensations, novations, rescissions, restitutions of matters to the first state they were in.

#### *V. Division of the Matters of the First Part into Four Books.*

It is to these two kinds of engagements, and to these two kinds of their consequences, that all the matters of this first part are reduced: and they shall be ranked there into four books.

#### *VI. First Book, of Engagements by Covenant.*

The first shall be of covenants, which are voluntary and mutual engagements.

#### *VII. Second Book, of Engagements without a Covenant.*

The second, of engagements which are formed without a covenant.

#### *VIII. Third Book, of the Consequences of Engagements which add to or corroborate them.*

The third, of the consequences which add to engagements, or which strengthen and corroborate them.

#### *IX. Fourth Book, of the Consequences of Engagements which diminish or annul them.*

The fourth, of the consequences which annul, diminish, or change the engagements.

• *X. Matters of the First Book.*

This first book, of covenants, shall have in the beginning thereof a title of covenants in general. For, seeing there are many principles and many rules which are common to all the kinds of covenants, order requires that we should not repeat those common rules in every covenant to which they belong, but that we should gather them all together in one place. We shall afterwards rank under particular titles the different kinds of covenants, and we shall add, at the end of the first book, a last title, of the vices of covenants, such as fraud, stellionate, and others; in which we shall treat of the effect which error and ignorance, whether it be of fact or of law, force and fear, and other vices, have in the covenants wherein they happen to be.

We have inserted in this first book of covenants the matter of usufruct, and that of services, because usufruct and services are often required by covenants, as by donations, by sales, by exchanges, by transactions, and by other contracts. Thus, although a usufruct and a service may be acquired by testament, yet it is natural that these matters, which ought to be only in one place, should be put down in the first place to which they have relation.

*XI. Matters of the Second Book.*

The second book, which shall be of engagements without a covenant, shall take in those which are formed without a mutual consent; such as the engagements of tutors, those of curators, who are named either to persons, such as minors, prodigals, madmen, and others, or to goods, as to a vacant succession; the engagement of persons who manage the affairs of others in their absence, and without their knowledge, and that of the persons whose affairs have been managed; the engagements of persons who chance to have something in common together without a covenant; and there are divers other sorts of involuntary engagements, and some which are even formed by accidents.

*XII. Matters of the Third Book.*

The third book shall treat of the consequences of engagements, whether they be voluntary or involuntary, which add to them, or corroborate them, and shall contain the several matters.

which have this character; such as mortgages, the privileges of creditors, the obligations of persons bound jointly together each for the whole sum, suretyships, costs, and damages. This book shall likewise take in the matter of proofs and presumptions, and of an oath, which are consequences of all sorts of engagements, and which corroborate them. And although proofs and an oath serve likewise to dissolve engagements, yet this matter, which ought not to be put in several places, ought to be inserted in the first place where it comes in naturally. We shall likewise place among the consequences which strengthen and fortify engagements, possessions and prescriptions, which confirm the rights which people acquire by covenants, and by other titles. And although prescriptions have also the effect to annul engagements, yet it is natural to place them in this book, for the same reason that proofs are taken into it.

### XIII. *Matters of the Fourth Book.*

The fourth and last book of this first part shall be of the consequences which diminish, change, or annul engagements, and which shall contain the matters which have this character; such as payments, compensations, novations, delegations, rescissions, and restitutions.

### XIV. *The Second Part, which is of Successions.*

The second part, which is to be of successions, comprehends a great number of matters, and different enough to make a division of them into five books.

### XV. *Division of the Matters of the Second Part into Five Books.*

To conceive aright the order of these five books, we must consider that there are two ways of succeeding; the one of successions which are called legal, that is to say, regulated by the laws which make the goods to pass from those who die to the persons whom they call to succeed them; and the other of testamentary successions, which make the goods to pass to those who are instituted heirs or executors, by a testament.

### XVI. *First Book, of Matters common to Legal and Testamentary Successions.*

And because there are some matters common to legal successions and to testamentary successions, it being proper that

these matters should go before, they shall be contained in a first book.

*XVII. Second Book, of Legal Successions.*

Which shall be followed by a second, in which legal successions shall be explained.

*XVIII. Third Book, of Testamentary Successions.*

And by a third, which shall contain testamentary successions.

*XIX. Fourth Book, of Legacies, and Donations in Prospect of Death.*

Seeing it often happens that persons who name heirs, or executors, in their testaments, and those also who will have no other heirs besides the heirs of blood, do not leave all their goods to their heirs, or executors, but make particular donations to other persons by testaments, or codicils, or other dispositions made in prospect of death; these sorts of dispositions shall be the subject-matter of a fourth book.

*XX. Fifth Book, of Substitutions, and Legacies in Trust.*

And lastly, seeing the law has added to the liberty of making heirs, or executors, and legatees, that of substitutions, and of devises in trust, which call a second successor in the place of the first heir, or executor, or of the first legatee; this matter of substitutions, and of devises in trust, shall be the subject-matter of a fifth book.

*XXI. Matters of the First Book.*

The first of these five books, which shall be of successions in general, shall contain the matters that are common to the two kinds of successions; such as the engagements of the quality of heir, or executor, the benefit of an inventory, the manner of accepting an inheritance, or succession, or of renouncing it, and the partitions among co-heirs, or co-executors.

*XXII. Matters of the Second Book.*

The second book, which shall be of legal successions, shall explain the order of these successions, and the manner in which children and other descendants are called to them; as also

fathers, mothers, and other ascendants; brothers, sisters, and other collaterals. These legal successions are also called successions of *intestates*: and this word is particularly made use of in the Roman law, because the heirs at law, who are the heirs of blood, do not succeed except when there is no testament; but this is not to be understood of persons to whom a legitime, or child's part, is due by law.

### XXIII. *Matters of the Third Book.*

The third book, which shall be of testamentary successions, shall contain the matters which concern testaments, their formalities, disherison, undutiful testaments, the legitime, or filial portion, and the dispositions of those who have contracted a second marriage.

### XXIV. *Matters of the Fourth Book.*

The fourth book shall be concerning legacies, and other dispositions made in prospect of death: and in that we shall treat of codicils, of donations in prospect of death, and of legacies.

### XXV. *Matters of the Fifth Book.*

The fifth book shall contain the matters relating to the several kinds of substitutions, and of legacies and institutions of heirs, or executors, in trust for others.

### XXVI. *The Conclusion of this Plan of the Matters. — Reasons for the Order observed in it.*

All these several matters, of which this is the plan, are the matters which shall be treated of in this book of *The Civil Law in its Natural Order*. We have not explained here particularly the nature of these matters; because we shall explain in every one, at the head of each title, that which shall be necessary for knowledge of it before reading the particular rules.

Neither have we taken up time to give a reason for the order that is particularly observed in the matters of each book. We have endeavoured by several views to range them either according as their nature makes them subsequent to one another, or according as it appeared necessary to us that the one should go before the others, in order to their being better understood. Thus, for example, in the first book of the first part, in which are explained the several sorts of covenants, after the title of

*Covenants in general*, we have placed that of the *Contract of Sale*, because that, of all the covenants, there is not any one which contains so many particular matters as the contract of sale, and because the rules of that contract agree to many other covenants, and give a great deal of light to other matters. Thus, for other the like considerations, all the other matters have been ranged in the order which they have; but it would be too tedious, and to no manner of purpose, to give a reason in each particular matter for the situation in which it is placed. We shall only observe, that, although the matter touching mortgages might have been placed in the number of covenants, because it is usually by covenant that the right of mortgage is acquired, yet it was proper to put this matter in another place, because the mortgage is never a primary covenant and a principal engagement, it being always an accessory to some other engagement, and often to engagements which are contracted without any formal covenant, such as those of tutors and guardians, and others also, in which the mortgage is acquired by law. Thus, this matter hath naturally its order in the third book: and the same reasons have obliged us to place the matter of suretyships, and those of obligations, wherein several persons are bound jointly for the whole debt, in the same rank.

#### XXVII. *Remark on the Matters which belong to the Public Law.*

We must observe, in the last place, that, besides the matters which are to be treated of in this book according to the plan which has been just now drawn of them, there are others which are contained in the body of the Roman law, and which are also in use in France, and for which reason it would seem as if they ought to have been comprehended in this book; such as the matters relating to the exchequer, to cities and corporations, criminal matters, the order of judicial proceedings, and the duties of judges. But these matters being regulated by the ordinances, and being a part of the public law, it was not proper to insert them here. And because there are in the Roman law many essential rules concerning these matters, which, being natural rules, are in use with us, the topics to which they relate will make the subject of a separate and distinct work. It will be proper, however, to indicate here the order of these matters, and also of those of our customs which are unknown to the Roman law.

All these matters of the public law ought to be preceded by



those which shall be explained in this book. For, besides that they presuppose many rules which shall be there explained, it is natural, since the public law has a relation to private persons, that the matters which concern private persons should go before those which are of the public law; and it is probably for these reasons that, in the Roman law, the matters concerning the exchequer, and those relating to cities or corporations, and criminal matters, have been placed after the others. Thus, after the matters treated of in the present work, we may place those fiscal and municipal matters which concern the rights of the prince and the police of cities, those matters which regard corporations, and other bodies and communities, and those which relate to crimes and punishments. The order of judicial proceedings, comprehending the practice both in civil and criminal cases, and the functions and duties of judges, as it is a matter which has relation to all the others, seems properly to belong at the end of the whole.

As to those matters which are peculiar to the customs of France, such as fiefs, the right of redemption belonging to families, wardships, the community of goods between husband and wife, the institutions of heirs by contract, the prohibition of bequeathing a part of the goods to the prejudice of the heirs of blood, the renunciations by daughters of their right to successions, and every thing which the customs have in particular relating to successions, donations, and other matters, it is not necessary to mention their rank here; it being easy to judge that these matters relate either to engagements, or to successions. Thus, fiefs were in their first origin covenants between the lord and the vassal. Thus, the right of redemption belonging to the family of the seller is a consequence of the contract of sale. Thus, the matter of wardships, whether of noblemen's children or citizens, is a kind of usufruct joined with a guardianship. Thus, the community of goods between husband and wife, and the wife's jointure, are covenants either express or tacit, which have a connection with the matter of dowries. Thus, the institution of heirs by contract is a matter which is made up partly of the nature of testaments, and partly of that of covenants, and hath its rules from these two sources. Thus, every one of all the other matters of the customs hath its rank fixed: and it is easy to perceive the order which they have in the plan that has been explained.

THE

CIVIL LAW IN ITS NATURAL ORDER.

PRELIMINARY BOOK.



# THE CIVIL LAW.

## PRELIMINARY BOOK.

### OF THE RULES OF LAW IN GENERAL, PERSONS, AND THINGS.

1. *The Subject-Matter of this Book.*— We have given the name of *Preliminary* to this book, because it contains three kinds of matters, which, being common to all the others treated of in this work, and necessary for understanding them aright, ought to be placed first in order. And, indeed, the matters contained in this book are, as it were, the first elements of the law; for, before we descend to a particular inquiry into the rules of the law, it is necessary, in the first place, to know, in general, the nature and several kinds of these laws, and the ways of understanding and applying them justly. And this shall be the subject-matter of the first title of this book.

2. And because in the examination of the several matters treated of in the body of the law, and in particular laws, we must always consider the persons whom the said matters and laws relate to; and because there are in all persons certain qualities, with respect to which they are considered and distinguished by the laws, and which have a particular relation to all the matters treated of in the body of the law; these qualities, and these distinctions of persons, shall be considered in the second title of this book.

3. And the third title shall contain the ways in which the laws consider and distinguish the several kinds of things, by the qualities which fit them for the use and commerce of persons; and according as these uses and this commerce of things enter into the order established by the laws.

## TITLE I.

## OF THE RULES OF LAW IN GENERAL.

4. *The Matters treated of in this Title.*—The rules which shall be explained under this title concern in general the nature, use, and interpretation of laws. And seeing these rules are common to all the matters contained in the body of the law, and are of constant use, the reader is advised not to content himself with a bare and simple reading them over, but to peruse them diligently from time to time, and to have recourse to them always upon occasion. It will not be improper for him to read likewise, at the same time, the eleventh and twelfth chapters of the Treatise of Laws.

## SECTION I.

## OF THE SEVERAL SORTS OF RULES, AND OF THEIR NATURE.

5. *Of the Ideas formed by the Words "Laws" and "Rules."*—We understand commonly by these words *laws* and *rules*, that which is just, that which is commanded, that which is regulated. But whereas the laws ought to be written, to the end that the writing may fix the sense of the law, and determine the mind to conceive a just idea of that which is established by the law, and that it be not left free for every one to frame the law as he himself is pleased to understand it; we may therefore distinguish two ideas which the words *law* and *rule* form in our minds. One is the idea of what we conceive to be just, without making any reflection on the terms of the law: the other is the idea of the terms of the law; and according to this second idea, we give the name of rule, or law, to the *expression of the law-giver*.

6. We shall always use the word *laws*, and that of *rules*, without any distinction, both in the one and the other of the two senses above mentioned, not only in this preliminary book, but likewise in the following part of the work, as we shall have occasion to mention them. For there are many written laws, such as are all arbitrary, or positive laws; and there are many natural rules of equity, which are not set down in writing.

7. It is not necessary, after what has been said of laws and rules in the *Treatise of Laws*, to define anew in this title what a law is, and what a rule: it will be sufficient here to give an idea of the rules of law, in the sense which comprehends the written rules; because it is in the knowledge of all the written rules, that the whole science and study of the law consist.

### ARTICLE I. •

8. *Definition of Rules.* — The rules of law are short and clear expressions of that which justice requires, in the respective cases. And each rule hath its peculiar use for those whom its provision may concern. Thus, for example, it may happen, through several accidents, that the buyer is dispossessed of what he has bought, or molested in his possession, by those who pretend to be owners of it, or to have some right to it; and the justice that is common to all these kinds of accidents, which requires the seller to put a stop to all evictions, and other troubles, is contained in the expression of this rule, *that every seller ought to warrant that thing which he has sold.*<sup>a</sup>

### II.

9. *Two Sorts of Rules, Natural and Arbitrary.* — Laws, or rules, are of two sorts; one is of those which flow from the law of nature and equity; and the other is of such as derive their origin from the positive law, which are otherwise called human and arbitrary laws, because they have been established by men.<sup>b</sup> Thus, it is a rule of the law of nature, that a donation may be revoked, because of the ingratitude of the donee; and it is a rule of the positive law, that donations which are to have their effect in the lifetime of the donor and donee ought to be enrolled.

### III.

10. *Which are the Natural Rules.* — The rules of the law of nature are those which God himself hath established, and which he communicates to mankind by the light of reason. These are the laws which have in them a justice that cannot be changed, which is the same at all times and in all places; and whether

<sup>a</sup> *En l. D. de reg. jur. ; — l. 23, D. de verb. sign.*

<sup>b</sup> *L. 9, D. de just. et jur. ; — l. 11, D. de just. et jur.* See the eleventh chapter of the *Treatise of Laws*.

they are set down in writing or not, no human authority can abolish them, or make any alteration in them. Thus, the rule which obliges the depositary to preserve and to restore the thing committed to his keeping, that which obliges one to take care of the thing he has borrowed, and other rules of this kind, are all of them natural and immutable rules; which are observed in all places.\*

## IV.

11. *Which are the Arbitrary Rules.*—Arbitrary rules are all those that have been established by men, and which are such, that, without offending natural equity, they may either prescribe one thing, or a thing quite different. Thus, for instance, it was free for men to establish or not to establish the use of fiefs. Thus, a longer or shorter term of years might have been fixed for prescriptions; and a greater or lesser number of witnesses to a testament. And this diversity, which is not fixed by nature, makes these laws to derive their authority from the arbitrary regulation made by the lawgiver who has established them; and consequently renders them liable to changes.<sup>d</sup>

## V.

12. *Another Division of Rules.*—The rules of law, whether natural or arbitrary, are of three kinds. Some of them are general, which agree to all matters; others are common to several matters, but not to all; and many are peculiar only to one matter, and have no relation to others. For example, these rules of natural equity, *that we must do wrong to no man, that we ought to render to every one what is his due*, are general, and belong to all sorts of matters. This rule, *that agreements made between parties are to them in the place of laws*, is common to several matters; for it agrees to all kinds of contracts, covenants, or pacts; but it has no relation to testaments, nor to several other matters. And the rule for making void a sale, in which any one of the parties is damaged more than half of the just price, is a rule peculiar only to the contract of sale.<sup>e</sup> So

\* § 11, *Inst. de jur. nat. gent. et civ.*; — l. 9, *D. de just. et jur.*; — l. 11, *cod.*; — l. 8, *D. de cap. min.*

<sup>d</sup> § 11, *Inst. de jur. nat. gent. et civ.*

<sup>e</sup> Example of general rules: — *Juris præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere.* L. 10, § 1, *D. de just. et jur.*; — § 3, *Inst. cod.* Ex-

that, in the use and application of the rules of law, it is necessary to discern in every one its limits and its extent.

## VI.

13. *Two Ways of abusing the Rules.* — All these rules cease to have their effect, not only when they are drawn beyond their limits, and applied to matters to which they have no manner of relation, but likewise when, in the application of them to the matters to which they belong, they are either falsely or wrongfully applied, contrary to the true intent of them. Thus, the rule for making void all sales, in which any one of the parties is damaged above the half of the just price, would be ill applied to a sale made by way of accommodation in a transaction.<sup>f</sup>

## VII.

14. *Exceptions are Rules.* — Exceptions are rules which limit the extent of other rules; and they prescribe contrary to the general rule, out of a particular view, which renders either just or unjust that which the general rule, being understood without any manner of exception, would on the contrary have rendered either unjust or just. Thus, for example, the general rule, that we may make all manner of contracts, is limited by the rule which forbids those that are contrary to equity and good manners. Thus, the prohibition to alienate things that are sacred is limited by the rule which allows them to be sold for necessary causes, certain formalities being observed in the sale.<sup>g</sup>

## VIII.

15. *Two Sorts of Exceptions.* — Exceptions, as well as rules, are of two kinds. Some of them are of the law of nature, and others of the positive law; as appears by the examples in the foregoing article, and by all the other exceptions, every one of which may be reduced to one or other of these two kinds.<sup>h</sup>

ample of rules common to many matters: — *Contractus legem ex conventionibus accipiunt.* L. 1, § 6, *D. depos.* As to particular rules, each title hath its own. V. l. 2, *Cod. de resc. vend.*

<sup>f</sup> L. 1, in *f. D. de reg. jur.*

<sup>g</sup> L. 1, *D. de pact.*; — l. 4, *C. de inut. stip.*; — l. 7, § 7, *D. de pact.*; — l. 6, *Cod. eod.*; — l. 21, *C. de sacrosanct. eccl.*; — v. l. 14, *et auct. hoc jus eod.*

<sup>h</sup> This is a consequence of the preceding and second articles of this section.



## IX.

16. *Laws ought to be known.*—All laws ought either to be known, or at least laid open to the knowledge of all the world, in such a manner, that no one may with impunity offend against them, under pretence of ignorance. Thus, the natural rules being truths that are unchangeable, the knowledge of which is essential to reason, nobody can pretend ignorance of them, since they cannot say that they are destitute of common reason, which makes these rules known. But arbitrary laws have not their effect, till the lawgiver has done all that is possible to make them known; and this is done by the ways that are commonly practised for the publication of these kinds of laws; and after they are promulged in due form, it is presumed that they are known to every body, and they oblige as well those who pretend ignorance of them, as those who know them.<sup>1</sup>

## X.

17. *Two Sorts of Arbitrary Laws, Written Laws and Customs.*—Arbitrary rules are of two sorts. The one is of those that have been originally enacted, written, and promulged, by those that had the legislative authority; and such are, in France, the edicts and ordinances of the kings. The other is of such laws, of whose origin and first establishment there is nothing appears, but which are received by universal approbation, and by the constant use that the people have made of them time out of mind; and these are the laws or rules to which we give the name of customs.<sup>2</sup>

## XI.

18. *The Foundation of the Authority of Customs.*—Customs derive their authority from the universal consent of the people who have received them, when it is the people that have the power of making laws, as in commonwealths. But in kingdoms that are subject to a sovereign prince, no customs received by the people come to have the force of laws, but by the authority of the prince. Thus, in France, the kings have caused to be fixed, and reduced into writing, and established into laws, all the customs, reserving to the respective provinces the laws which

<sup>1</sup> L. 9, *Cod. de legib.*; — l. 12, *Cod. de jur. et fact. ign.*; — § 1, in *fin.* in *promulg. Inst.*; — l. 2, *U. de in jus voc.*

<sup>2</sup> § 3, *Inst. de jur. nat. gent. et civ.*; — § 9, *cod.*

they have, either by the ancient consent of the inhabitants of the said provinces, or of the princes who governed them.<sup>1</sup>

## XII.

19. *Natural Laws regulate what is Past, and what is to come.* — The laws of nature being highly just, and their authority always the same, they determine equally all that is to come, and all that is past, which remains undecided.<sup>m</sup>

## XIII.

20. *Arbitrary Laws regulate only what is to come.* — Although the justice of arbitrary laws is founded upon the public good, and upon the equity of the motives which give rise to them; yet seeing they derive their authority only from the power of the lawgiver, who determines us to what he prescribes, and since they have not their effect till after they have been made known to the people by publication, they regulate only what is to come, and have nothing to do with what is past.<sup>n</sup>

## XIV.

21. *The Effect of New Laws with respect to what is Past.* — The affairs which happen to be depending, and undecided, at the time when new laws are enacted, are judged by the tenor of the preceding laws; unless, for some particular reasons, the new laws mark expressly that they shall take place even in things that are past. Or that, without any such expression, the new laws be such as ought to serve for a rule to what is past; as if the new laws serve only to revive a former law, or a rule of natural equity, which had been altered by some abuse; or that they

<sup>1</sup> Id custodiri oportet, quod moribus et consuetudine inductum est. *L. 32, D. de legib.* Inveterata consuetudo pro lege non immerito custoditur. Nam cum ipsæ leges nulla alia ex causa nos teneant, quam quod iudicio populi receptæ sunt, merito et ea, quæ sine ullo scripto populus probavit, tenebant omnes. Nam quid interest suffragio populus voluntatem suam declaret, an rebus ipsis et factis? *D. l. 32, § 1, D. de legib.* Tam conditor quam interpret legum solus Imperator juste existimabitur; nihil hac lege derogante veteris juris conditoribus, quia et eis hoc majestas imperialis permisit. *L. ult. in fin. cod. de leg. et const. prin.* Communis reipublicæ sponsio. *L. 1 et l. 2, D. de legib.*

Although these last words be spoken of laws, and not of customs, yet they agree to customs as much, or rather more, than to laws. See the ordinance of *Charles VII.*, of the year 1453, Art. 125, and of *Letis XII.*, of the year 1510, Art. 49, for reducing the customs into writing.

<sup>m</sup> § 11, *Inst. de jur. nat. gent. et civ.*; — *l. 11, D. de justit. et jur.*

<sup>n</sup> *L. 7, C. de legib.*

regulate questions, for the deciding of which there was no law nor any custom in being. Thus, for instance, when the king ordained that the price of offices should be distributed according to the order of mortgages, that law served as a rule for the causes that were undecided in the provinces, where they had no custom to the contrary, to serve them as a rule.\*

## XV.

22. *Another Effect of New Laws, as to what is Past.*—As new laws regulate what is to come, so they may, as occasion requires, change the consequences that former laws would have had. But this is always without prejudice to the right that any persons had already acquired. Thus, for example, before the ordinance of Orleans, one might have made substitutions in several degrees, without any bounds, and that ordinance did limit the substitutions that should be made thereafter to two degrees besides the institution. But whereas that ordinance did not for the future hinder the effect of the substitutions which had been made before, the ordinance of Moulins did reduce to the fourth degree, besides the institution, the substitutions which had been made before the ordinance of Orleans. And at the same time, it excepted the substitutions of which the right was already fallen and acquired, although it was beyond the fourth degree.<sup>p</sup>

## XVI.

23. *Of the Time when New Laws begin to be in Force.*—Arbitrary laws begin to have their effect for the time to come, either from the day of their publication, or only after the delay which they appoint. Thus, some laws that make changes which would be attended with great inconveniences, were they suddenly put in execution,—such as the prohibition of some commerce, the augmentation or diminution of the value of the current coin, and the like,—leave for some time things in the same condition in which they were, and fix the time at which they shall begin to be put in execution.<sup>q</sup>

\* L. 7, C. de legib. et const. princ.; — l. 7, C. de nat. liber.; — l. 21, C. de sacrosanct. eccl.; — l. 23, in f. eod.; — l. un. C. de contr. jud.; — l. ult. C. de pact. pign. et de lege com. in pr.

<sup>p</sup> L. 7, C. de legib. See the ordinance of Orleans, Art. 59, and that of Moulins, Art. 57.

<sup>q</sup> This is a consequence of the foregoing rules, and a natural effect of the authority and prudence of the lawgiver.

## XVII.

24. *Two Ways by which Laws are repealed.* — Arbitrary laws, whether they are established by the authority of a lawgiver, or by custom, may be abolished or changed two ways; either by an express law, which repeals them, or makes some alteration in them; or by a long disuse, which changes or abolishes them.\*

## XVIII.

25. *Several Effects of Laws.* — The use and authority of all laws, whether natural or arbitrary, consists in commanding, forbidding, permitting, and punishing.†

## XIX.

26. *Laws restrain whatever is done in Fraud of them.* — Laws restrain and punish, not only what is evidently contrary to the sense of their words, but likewise every thing that is directly or indirectly against their intent, although it seem to have nothing contrary to the terms of the law, and also every thing that is done in fraud of the law, and to elude it.‡ Thus, the laws which forbid the giving or bequeathing any thing to certain persons annul the donations or bequests made to other persons interposed, that they may transmit the bounty to those who are capable of receiving it in their own names.

## XX.

27. *Laws annul or restrain what is done contrary to their Prohibition.* — If a law forbids, either in general to all persons, or in particular to some sort of persons, certain contracts, or a certain commerce, or contains other prohibitions, of what kind soever; whatever shall be done contrary to these prohibitions, with all its consequences, shall either be annulled or restrained, according to the quality of the prohibition and that of the contravention; and that even although the law make no mention of the nullity, and that it leave the other penalties undetermined.¶

\* § 11, *Inst. de jur. nat. gent. et civ.*; — l. 32, in f. *D. de legib.*

† L. 7, *D. de legib.*

‡ L. 5, *C. de legib.*; — l. 29, *D. eod.* — l. 30, *eod.*

¶ L. 5, *C. de legib.* The law would be very imperfect, if it should not annul what is done contrary to its prohibitions, and if it should let the contravention of them go unpunished. *Ulp. t. 1, § 2*; — v. l. 63, *D. de rit. nup.*

## XXI.

28. *Laws are General, and not made for One Case or One Person.*—Laws are never made for one particular person, nor limited to one single case; but they are made for the common good, and prescribe, in general, what is most useful in the ordinary occurrences of human life.\*

## XXII.

29. *Sequel of the foregoing Rule.*—Seeing the laws embrace, in general, all the cases to which their intention may be applied, they do not express in particular the several cases to which they may have relation. For this particular enumeration, as it is impossible, so it would be to no purpose. But they comprehend in general all the cases to which their intention may serve as a rule.†

## XXIII.

30. *Equity is the Universal Law.*—If any case could happen that were not regulated by some express and written law, it would have for a law the natural principles of equity, which is the universal law that extends to every thing.‡

## SECTION II.

## OF THE USE AND INTERPRETATION OF RULES.

31. *Reasons why it is necessary to interpret Laws.*—By the use of rules is meant here the manner of applying them to the questions that are to be decided; and the application of the rules does often require their interpretation.

It happens in two sorts of cases, that it is necessary to interpret the laws. One is, when we find in a law some obscurity, ambiguity, or other defect of expression; for in this case it is necessary to interpret the law, in order to discover its true mean-

\* L. 1, D. de legib.; — l. 3, D. cod.; — l. 3 et seq. D. cod.; — Novel. 39, cap. 1. See the following article.

† L. 10, D. de legib.; — l. 12, cod.; — l. 27, cod.; — v. l. 12, C. cod.; — l. 32, D. ad legem Aquilianam.

‡ L. 2, § 5, in fine, D. de aqua et aqua plu. arc.; — l. 7, D. de bon. damnat.; — l. 13, § 7, D. de excus. tut.

ing. And this kind of interpretation is limited to the expression, that it may be known what the law says. The other is, when it happens that the sense of a law, how clear soever it may appear in the words, would lead us to false consequences, and to decisions that would be unjust, if the laws were indifferently applied to every thing that is contained within the expression. For, in this case, the palpable injustice that would follow from this apparent sense obliges us to discover by some kind of interpretation, not what the law says, but what it means; and to judge by its meaning how far it ought to be extended, and what are the bounds that ought to be set to its sense. And this kind of interpretation depends always on the temperament that some other rule gives to the law, which we should be in danger of misapplying, if we did not explain it. For it is this temperament that gives to the said law its use and its verity. But this matter will be better understood by examples. And in order to make them the more useful for such as have least knowledge and experience, we shall set down one example so clear, that it will convince every body, at first sight, that we ought not always to take the law in the literal sense; and we shall subjoin another, in which it will not be so very easy to discern this truth.

32. *Examples.*—There is no rule in law more evident and certain than this, that a depositary ought to restore the thing deposited to the person who intrusted him with it, whenever he shall please to call for it; but if the owner of money deposited has lost the use of his reason when he calls for his money, every body must own that it would be a great injustice in the depositary to give it him back. For who does not see, that there is another rule which forbids the giving to a mad man a thing that may perish in his hands, or which he may make a bad use of, and that to restore it to him would be to do him prejudice? Thus, it is by this second rule that we interpret and limit the sense of the other.

33. This is another most certain rule, that the heir succeeds to the rights of the deceased; but this rule would be ill applied to the heir of a partner, who should pretend to succeed to the deceased in his quality of partner, for that does not descend to the heir. And this is founded upon another rule, which requires that partners should choose one another reciprocally: and by this rule it would be unjust that the heir of a partner should be

partner, unless he were approved of by the other partners, and they likewise approved of by him. Thus, this second rule obliges us to interpret the sense of the other, and to restrain it. And we see in this second example, that it is not so easy in it as in the first to discover the principle upon which this interpretation is grounded, and which gives to each of these rules its just effect, by limiting the sense of the first.

34. It appears by these examples, and will appear likewise in all the others, where it is necessary to interpret the sense of a law, that this interpretation, which gives to the law its just effect, is always founded upon some other rule, which requires another thing than what appeared to be regulated by the sense of the law not rightly understood.

35. *The View of Equity is the First Way to interpret the Laws.* — It follows from this remark, that, for the right understanding of a rule, it is not enough to apprehend the apparent sense of the words, and to view it by itself; but it is necessary likewise to consider if there are not other rules that limit it. For it is certain that, every rule having its proper justice, which cannot be contrary to that of any other rule, each rule hath its own justice within its proper bounds. And it is only the connection of all the rules together that constitutes their justice, and limits their use. Or rather, it is natural equity, which, being the universal spirit of justice, makes all the rules, and assigns to every one its proper use. From whence we must infer, that it is the knowledge of this equity, and the general view of this spirit of the laws, that is the first foundation of the use and particular interpretation of all rules.

36. *The Intention of the Lawgiver, in Arbitrary Laws, fixes the Temperament of Equity.* — This principle of interpreting the laws by equity does not only respect the laws of nature, but reaches likewise to the arbitrary laws, they being all of them founded upon the laws of nature, as has been observed in the eleventh chapter of the Treatise of Laws. But to this principle of equity we must add, in so far as concerns the interpretation of arbitrary laws, another principle, which is peculiar to them, and that is, the intention of the lawgiver, which determines how far the arbitrary laws regulate the use and interpretation of this equity. For, in this kind of laws, the temperament of equity is restrained to what is agreeable to the intention of the lawgiver, and is not extended to whatever might have appeared to be equi-

table, before the arbitrary law was enacted. Thus, for instance, it is just and equitable, that he who has courteously lent his money, without taking a note for it, should be admitted to prove the loan, if he has other proofs than a note which he omitted to take, and the debtor denies that he borrowed the money. And the same equity requires also the same usage in the other kinds of covenants. But because it is for the public good, and agreeable to equity, not to leave room for too great a facility of bringing false proofs, and because it is sufficient to advertise those who lend, or who make other agreements, to take a note in writing, the ordinance of Moulins, and that of 1667, which have forbid the proofs of covenants without writing, when they exceed the sum of one hundred livres, have by that regulation set just bounds to the liberty of receiving proofs of covenants. And if some proofs are received contrary to the letter of that ordinance, as in the case of a necessary deposit, such as that which is made in the case of fire, it is because the intention of the ordinance doth not extend to this case, where it has been necessary to make the deposit, and impossible to take a receipt in writing.

37. *Another Example.*—Thus, for another instance of the effect of the will of the lawgiver, in what relates to the interpretation of arbitrary laws by natural equity, the same equity requires, that a buyer should not take any advantage of the necessity of a seller, to purchase a thing at too low a price. And upon this principle, it would seem to be just to annul all sales in which the price falls short of the true value of the thing, either a third or fourth part, or even less, according to the circumstances. But the inconveniences that would attend the making void all sales in which the parties should be found to sustain such damages, gave occasion to a law, which restrains the liberty of annulling sales on account of the lowness of the price to the sales of immovables, in which the damage sustained should exceed the half of the just value of the thing sold. And this law puts a stop to all other use and all other application of equity, as to any damage sustained in the price of any thing sold.

38. *Several Views necessary for the Interpretation of Laws.*—In order to make a right use of this fundamental principle for the interpretation of laws, which is equity, it is not enough to observe in each rule what the light of reason finds to be equita-



ble in its expression, and in the extent which it seems to have; but we must join to this a general view of universal equity, that we may discern in the cases which are to be regulated, whether there are not other rules that demand a justice altogether different, to the end we may not pervert any rule from its true use, and that we may apply to the matters of fact, and to their circumstances, the rules that agree to them. And if they are natural laws, we are to reconcile them by the extent and limits of their truth; or if they are arbitrary laws, we are to fix their equity by the intention of the lawgiver.

39. The reader must take heed that he do not confound these kinds of interpreting laws, which we have been just now speaking of, with those interpretations that are reserved to the sovereign, of which mention shall be made in the twelfth article of this section. And it will be easy to perceive the difference between these two kinds of interpretations, by the rules which shall be explained in this section.

## ART. I.

40. *The Spirit of Laws.*—All rules, whether natural or arbitrary, have their use, such as it is assigned to every one of them by universal justice, which is the spirit of them all. Thus, the application of the laws is to be made, by discerning what it is that this spirit demands; which in natural laws is equity; and in arbitrary laws is the intention of the lawgiver. And it is in this discerning faculty that the science of the law does chiefly consist.\*

## II.

41. *Natural Laws are misapplied, when Consequences are drawn from them contrary to Equity.*—If it happens, that a natural rule being applied to some case which it seems to include, there follows from such application a decision contrary to equity, we must from thence conclude, that the rule is not rightly applied, and that it is by some other rule that this case ought to be judged. Thus, for instance, the rule which directs that the person who has lent any thing to another for some use may take it back again whenever he pleases, would produce a con-

\* L. 90, *D. de reg. jur.*;—l. 4, § 4, *D. de eo quod certo loco*;—l. 18, *D. de legib.*;—l. 13, § 2, *D. de excus. tutor.*;—l. 17, *D. de legib.*;—l. 7, *D. de bon. damnat.*;—l. 1, *D. de just. et jur.*

sequence contrary to equity, if the lender were allowed to take back the thing lent during the time that the borrower is actually employing it to the use for which he borrowed it, and from whence it cannot be taken without some damage to the borrower. For this rule ceases to take place in this case, because of another rule, which requires that the lender should suffer the borrower to reap the advantage of the favor he bestows on him, and that he ought not to turn his kindness into an injury.<sup>b</sup>

### III.

42. *Arbitrary Laws are misapplied, when Consequences are drawn from them contrary to the Intention of the Lawgiver.* — If an arbitrary law being applied to a case which it seems to include, there follows a consequence contrary to the intention of the lawgiver, the rule ought not to be extended to that case. Thus, for example, the ordinance of Moulins, which annuls indifferently all substitutions for the want of publication, without specifying the persons with respect to whom they are to be null, does not render them such with respect to the executor who is burdened with the substitution; because the executor was obliged by another rule to cause publication of it to be made, as being charged with the execution of the dispositions of the testator; and he ought not to reap any benefit by his own negligence, or his dishonesty.<sup>c</sup>

### IV.

43. *Of the Rigor of the Law.* — We must not take for injustices contrary to equity, or to the intention of the lawgiver, those decisions which seem to have some hardship in them, which is called the rigor of the law, when it is evident that that rigor is essential to the law from which it flows, and that no temperament can be applied to the said law without annulling it. Thus, for example, if a testator, having indited his testament, and having read it over in the presence of witnesses, takes the pen in his hand to sign it, and dies in the very instant; or if after the testator has signed it, he forgets to get it signed by one of the witnesses; or if there is wanting to the testament any one of the formalities

<sup>b</sup> L. 183, *D. de reg. jur.*; — l. 90, *cod.*; — l. 17, § 3, *D. de commod.* See art. 1 of sect 3, of the *Loan of Things to be restored in Specie.*

<sup>c</sup> L. 13, § 2, *D. de excus. tut.* See the ordinance of Moulins, art. 57, and that of Henry II. in the year 1553, art. 4; — v. l. 12, § 3, *C. de œdific. priv.*

required by law or by custom; this testament will be absolutely null, whatever certainty we may have of the will of the testator, and however favorable the contents of his testament may be; because these formalities are the only way which the law allows of for proving the will of a testator. Thus the rigor which annuls all testaments, in which the formalities required by law are wanting, is essential to those very laws; and to mitigate the rigor of them would be to annul them quite.<sup>d</sup>

## V.

44. *The Mitigation of the Rigor of the Law.*—If the hardship or rigor of a law be not a necessary consequence of the law, and inseparable from it, but the law may have its effect by an interpretation which mitigates the said rigor, and by some temperament, which equity, that is, the spirit of the law, requires; we must in this case prefer equity to the rigor which the letter of the law seems to demand, and follow rather the spirit and intendment of the law, than the strict and rigid way of interpreting it.<sup>e</sup> Thus, in the case of a testator, who devises his estate in this manner, that if his wife, whom he leaves big with child, be brought to bed of a son, he shall have two thirds of his estate, and his wife one third; and if the child in the mother's womb happen to be a daughter, the mother and the daughter shall divide the estate equally between them; if the mother happens to bring forth both a son and a daughter, the rigor of the law seems to exclude the mother, because she is not called to any part of the succession, in the case that has happened. However, the father having declared his will that the mother should have a share of his estate, whether she were brought to bed of a son or a daughter, and having given her the half of what he left to his son, and as much as he left to his daughter, it is equitable that the will of the testator should be executed in the best manner it can; and therefore the son ought to have the half of the estate, and the mother and daughter each of them a fourth part.<sup>f</sup> Thus, for another instance, if a father and

<sup>d</sup> *L. 12, § 1, D. qui et a quib. man.*

<sup>e</sup> *L. 8, C. de judic. ;—l. 18, D. de legib. ;—l. 13, § 2, D. de excus. tut. ;—l. 2, § 5, in f. D. de aqua et aqua plu. arc. ;—l. 21, D. de interrog. ;—l. 1, § 1, D. si is qui test. lib. ;—l. 192, § 1, D. de reg. jur. ;—l. 56, eod. §—l. 168, eod.*

<sup>f</sup> *L. 13, D. de lib. et post.* We have altered the case of this law, with respect to the daughter, because this law, which is part of the old law, did not give her her legitime, or child's part.

a son die at the same time, as in a fight, so that it is not possible to know which of them survives the other; and if the widow, mother to the son, claims against the heirs of the father that part of the father's estate which would have fallen to the son if it were certain that he had outlived his father; the rigor of the law would, in this case, exclude the mother, because, the father and the son having died at the same time, and there being no evidence that the son was the longest liver, he cannot be said to have succeeded as heir to his father. And so the estate of the father would go to his own heirs, and not to the heirs of the son. But equity requires, that in this doubt it should be presumed, in favor of the mother, that it was the father who died first. And this is likewise the natural order.<sup>a</sup>

## VI.

45. *When we ought to follow either Equity or the Rigor of the Law.* — It follows from the foregoing rules, that we cannot lay it down as a general rule, either that the rigor of the law ought to be always followed, contrary to the temperament of equity, or that it ought always to yield to equity. But this rigor becomes an injustice, in the cases in which the law will admit of an equitable interpretation; and it is, on the contrary, a just rule, in the cases where such an interpretation would destroy the law.<sup>b</sup> Thus, the word *rigor* of the law is taken either for a hardship that is unjust and odious, and no ways conformable to the spirit of the laws, or for a rule that is inflexible, but which has nevertheless its justice. And we must be careful never to confound the use of these two ideas; but we ought to make a right discernment, and to apply either the just severity, or the temperament of equity, according to the preceding rules, and those which follow.

## VII.

46. *We are not at Liberty to follow indifferently either the Rigor of the Law, or Equity.* — It is never free and indifferent for us to choose either the rigor of the law, or equity, so as to be at liberty in one and the same case to apply either the one or the other in-

<sup>a</sup> L. 9, § 1, *D. de reb. dub.* It is to be remarked, as to this second instance, that it is to be understood only of such estates, as mothers have a right to succeed to, pursuant to the ordinance of Charles IX., commonly called the Edict of Mothers.

<sup>b</sup> This article is a consequence of the foregoing rules.

differently, and without injustice. But in every fact we must determine ourselves either to the one or to the other, according to the circumstances, and to what the spirit of the law requires. Thus, we must judge according to the rigor of the law, if the law admits of no mitigation; or according to the temperament of equity, if the law will bear it.<sup>1</sup>

### VIII.

47. *The Rigor of the Law, when it is necessary to be followed, hath its Equity.* — Although the rigor of the law seems to be distinct from equity, and to be even opposite to it, it is nevertheless true, that, in the cases in which this rigor ought to be followed, another view of equity makes it just. And as it never happens that what is equitable is contrary to justice, so likewise it never happens that what is just is contrary to equity. Thus, in the example of the fourth article, it is just to annul the testament in which the formalities required by law are wanting; because an act of such consequence ought to be accompanied with serious circumstances, and sure proofs of its truth. And this justice hath its equity in the public good, and in the interest which even testators themselves have, especially such as are sick, that that may not be easily taken for their will which it is not very certain that they have declared so to be.<sup>1</sup>

### IX.

48. *Interpretation of Obscurities and Ambiguities in a Law.* — The obscurities, ambiguities, and other defects of expression which may render the sense of a law dubious, and all the other difficulties of understanding aright and applying justly the laws, ought to be resolved by the sense that is most natural, that has the greatest relation to the subject, that is most conformable to the intention of the lawgiver, and most agreeable to equity. And this is discovered by the several views of the nature of the law, of its motive, of the relation it has to other laws, of the exceptions that may limit it, and by other reflections of this kind, which may discover the spirit and sense of the law.<sup>m</sup>

<sup>1</sup> This article is also a consequence of the preceding rules.

<sup>1</sup> This article is likewise a consequence of the foregoing rules.

<sup>m</sup> L. 19, D. de legib.; — l. 67, D. de reg. jur.; — l. 7, in D. de suppell. leg.; — l. 18, D. de legib.; — l. 17, cod. See art. 1, 2, and 3. of this section, and those which follow.

## X.

49. *A Law to be interpreted by its Motives, and the Tenor of it.* — For understanding aright the sense of a law, we ought to consider well all the words of it and its preamble, if there be any, that we may judge of the meaning of the law by its motives, and by the whole tenor of what it prescribes; and not to limit its sense to what may appear different from its intention, either in one part of the law taken separately, or by a defect in the expression. But we must prefer to this foreign sense of a defective expression, that which appears otherwise to be evident by the spirit of the whole law. Thus, it is to transgress against the rules and spirit of laws, to make use, either in giving of judgment or counsel, of any one part of a law taken separately from the rest, and wrested to another sense than what it has when it is united to the whole.<sup>a</sup>

## XI.

50. *How an Omission in a Law may be supplied.* — If there happens to be omitted in a law any thing that is essential to it, or that is a necessary consequence of its disposition, and that tends to give to the law its entire effect, according to its motive; we may in this case supply what is wanting in the expression, and extend the disposition of the law to what is included within its intention, although not expressed in the words.<sup>b</sup>

## XII.

51. *In what Cases we must have Recourse to the Prince for the Interpretation of a Law.* — If the words of a law express clearly the sense and intention of the law, we must hold to that. But if the true sense of the law cannot be sufficiently understood by the interpretations that may be made of it, according to the rules that have been just now explained, or, the sense of the law being clear, there arise from it inconveniences to the public good; we must in this case have recourse to the prince, to learn of him his intention, as to what is liable to interpretation, explanation, or miti-

<sup>a</sup> L. 24, *D. de legib.*; — l. 6, § 1, *D. de verb. sign.*; — l. 13, § 2, *D. de excus. tut.* See the preceding articles. See, upon the word *preamble*, the 134th law, § 1, *D. de verb. obl.*

<sup>b</sup> L. 13, *D. de testib.*; — l. 11, *D. de præscr. verb.*; — l. 17, *C. de excus. tut.*; — l. 7, § 2, *D. de jurid.* See in this section the 21st, 22d, and 23d articles, which serve as examples of this.

gation; whether it be for understanding the law, or mitigating its severity.<sup>9</sup>

## XIII.

52. *We must follow the Law, although its Motive be unknown.* — If, the true meaning of a law being well known, although we are ignorant of its motive, there seems to arise from it some inconvenience that cannot be avoided by a reasonable interpretation, we must presume that the law has nevertheless its usefulness, and its equity, founded upon some view of the public good, which ought to make us prefer the sense and authority of the law to the reasons that may be brought against it. For, otherwise, many laws very useful and well established would be overthrown, either by some other views of equity, or by subtilty of reasoning.<sup>9</sup>

## XIV.

53. *Laws which are favorably extended.* — The laws which are in favor of that which the public good, humanity, religion, the liberty of making contracts and testaments, and other such like motives render favorable, and those which are made in favor of any persons, are to be interpreted in as large an extent as the favor of these motives, joined with equity, is able to give them; and they ought not to be interpreted strictly, nor applied in such a manner as to be turned to the prejudice of those persons in whose favor they were made.<sup>9</sup>

<sup>9</sup> *L. 9, C. de leg.; — l. 1, cod.; — l. ult. cod.; — Nov. 143; — l. 11, D. cod.* Thus the parliament made remonstrances to Charles the Seventh, touching the declarations, interpretations, modifications, which were to be made to the ancient ordinances, upon which followed that of 1446. Thus the ordinance of *Moulins*, art. 1, and that of 1667, tit. 1, art. 3 and art. 7, enjoin the parliaments, and the other courts, to make their remonstrances to the king, touching what appeared in the ordinances to be contrary to the advantage or conveniency of the public, or to want interpretation, declaration, or mitigation. See the 33d article of the ordinance of *Philip VI.*, in the year 1349, empowering the council, and the chamber of accounts, to make the declarations and interpretations that should be wanted on the said ordinance. *De interpretatione canonum ecclesiasticorum, si quid dubietatis emergerit. V. l. 6, C. de sacrosanct. eccl. De dubietate, que in canonibus emergerit. V. l. 6, C. de sacrosanct. eccl.*

<sup>9</sup> *L. 20, D. de legib.; — l. 21, cod.; — l. 3, C. de crim. sacril.; — l. 51, § 2, D. ad l. Aquil.*

<sup>9</sup> *L. 25, D. de legib.; — l. 19, D. de lib. et post.; — l. 43, D. de relig. et sumpt. funerum; l. 6, C. de legib.; — l. 64, § 1, D. de caput. et dem.* See an example of the last part of this rule in the ninth article of the third section of the *Contract of Sale*; and another in the third law, § 5, *D. de carb. ed.* The rest needs no example.

## XV.

54. *Laws which are restrained.*—The laws which restrain our natural liberty, such as those that forbid any thing that is not in itself unlawful, or which derogate in any other manner from the general law; the laws which inflict punishments for crimes and offences, or penalties in civil matters; those which prescribe certain formalities; the laws which appear to have any hardship in them; those which permit disinheriting, and others the like, are to be interpreted in such a manner as not to be applied, beyond what is clearly expressed in the law, to any consequences to which the laws do not extend. And, on the contrary, we ought to give to such laws all the temperament of equity and humanity that they are capable of.<sup>a</sup>

## XVI.

55. *Laws which are not to be extended beyond what their Words expressly mention.*—If any law or custom happens to be established upon particular considerations, contrary to other rules, or to the general law, it ought not to be drawn to any consequence beyond the cases which the words of the law mark expressly. Thus, the ordinance which forbids the receiving proof of contracts exceeding the value of one hundred livres, and the proof of facts different from what appears to have been agreed on, does not extend to facts of another nature, where a contract does not come into question.<sup>b</sup>

## XVII.

56. *The Grants of Princes are favorably interpreted.*—The favors and grants of princes are to be favorably interpreted, and ought to have all the reasonable extent that the presumption of the liberality that is natural to princes can give them; provided that they are not extended in such a manner as to cause prejudice to other persons.<sup>c</sup>

<sup>a</sup> This is a consequence of the preceding rules. *L. 42, D. de pœn.; — l. 155, § ult. D. de reg. jur.; — l. 11, D. de pœn.; — vid. l. 32, eod.; — l. 19, D. de lib. et post.; — l. 10, § 1, D. de reb. dub.; — l. 14, D. de legib.; — l. 24, D. de pign.* Although the example of this slave be quoted in this law 10, § 1, *D. de reb. dub.*, upon the subject of testaments, yet it may be also applied here.

<sup>b</sup> *L. 141, D. de reg. jur.; — l. 14, D. de legib.; — v. l. 39, eod.*

<sup>c</sup> *L. 3, D. de const. princip.; — l. 2, § 16, D. de quid in loco publ. fiat; — v. l. 2, C. de bon. vac.*



## XVIII.

57. *Laws are interpreted one by another.* — If the laws in which there is some doubt, or other difficulty, have any relation to other laws which may help to clear up their sense, we must prefer to all other interpretations that which they may have from the other laws. Thus, when new laws have reference to old ones, or to ancient customs, or ancient laws to modern ones, they are interpreted one by the other, according to their common intention, in so far as the latter laws have not abrogated the former.\*

## XIX.

58. *Laws are interpreted by the Practice.* — If the difficulties which may happen in the interpretation of a law, or custom, are explained by an ancient usage, which has fixed the sense of the law, and which is confirmed by a constant series of uniform decrees, we must stick to the sense declared by the constant practice, which is the best interpreter of laws.†

## XX.

59. *In what Cases the Customs of Neighbouring Places, and of the Chief Towns, serve as Rules to the other Places.* — If any provinces or other places want certain rules for solving difficulties in matters that are there in use, and the said difficulties are not regulated by the law of nature, or by any written law, but depend on custom and use, they ought in this case to regulate themselves by the principles that follow from the customs of those very places. And if that does not determine the difficulty, they ought to follow what is regulated in such matters by the customs of the neighbouring places, and especially by those of the principal towns.‡

## XXI.

60. *Laws are extended to whatever is essential to their Intention.* — All laws extend to every thing that is essential to their intention. Thus, the laws allowing males to marry at the age of fourteen years complete, and females at the age of twelve, it is a consequence of these laws, that those who marry can bind themselves, although minors, to the performance of the articles agreed on in marriage, which relate to the wife's portion, her jointure, the com-

\* L. 26, D. de legib.; — l. 28, cod.

† L. 32, D. de legib.

‡ L. 37, D. de legib.; — l. 38, cod.

munity of goods, and other matters of the like nature. Thus, judges being established to administer justice, their authority extends to every thing that is necessary for the exercise of their functions; such as the right of inflicting penalties on those who contravene the orders of justice; and it is the same thing as to all the other consequences of their ministry.<sup>a</sup>

## XXII.

61. *The Laws which permit any Thing are extended from More to Less.*—In the laws which permit any thing, we draw the consequence from the greater to the lesser. Thus, those who have a right to give away their goods for nothing, have much more a right to sell them. And, in like manner, those who have a right to appoint executors by a testament, have with much greater reason a right to bequeathe particular legacies.<sup>b</sup>

## XXIII.

62. *The Laws which forbid extend from the Lesser to the Greater.*—In the laws which forbid any thing, we draw the consequence from the lesser to the greater. Thus, prodigals, who are not allowed to have the management of their own estate, are with much greater reason rendered incapable of alienating it. Thus, those who are declared to be unworthy of some office, or some honor, are much more unworthy of a greater office, and of a more considerable honor.<sup>c</sup>

## XXIV.

63. *An Exception to the two preceding Rules.*—This extension of laws from the lesser to the greater, and from the greater to the lesser, is limited to the things which are of the same kind with those that are mentioned in the law, or which are such that its motive ought to be extended to them, as in the examples of the foregoing articles.<sup>d</sup> But we must not draw the consequence either from the greater to the lesser, or from the lesser to the greater, when they are things of a different kind, or such as the spirit of

<sup>a</sup> L. 2, § 5, in f. *D. de aqua et aqua pluviae arcend.*; — l. 7, § 2, *D. de jurid.*; — l. 2, *cod.*

<sup>b</sup> L. 21, *D. de reg. jur.*; — l. 163, *cod.*; — l. 26, *cod.* See the two following articles.

<sup>c</sup> L. 4, *D. de senatorib.*; — l. 7, § ult. *D. de interd. et releg.*; — l. 5, *D. de serv. export.* See the following article.

<sup>d</sup> L. 110, *D. de reg. jur.*; — l. 165, *cod.*; — l. 4, *D. de fundo dot.*

the law is not applicable to.\* Thus, the law which permits persons who have attained to the years of marriage, although minors, to bind themselves by contracts of marriage, and to engage their estates for the performance of the covenants that are consequences of the marriage, would be wrongfully applied to other sorts of contracts, although of less importance. Thus, the liberty which an adult person has in his minority, to divide his whole estate by will, would not be rightly extended to the liberty of making over any part of it by a deed of gift that should take effect in his lifetime. Thus, the power which belongs to a lord of a manor, who has a royalty, or ample jurisdiction for the administration of justice within his own lordship, by a special grant of the sovereign, would be wrongfully applied to such as have grants only of an inferior jurisdiction, and in causes of lesser moment. Thus, it would be improper to extend the power of the highest judicial tribunal to a court of subordinate or inferior jurisdiction. Thus, the laws which brand persons with infamy would not be rightly extended to the confiscation of goods, although honor is much more valuable than any goods.

## XXV.

64. *Tacit Prohibitions.*—If any law should put a stop to the inquiry into any abuse, by pardoning it for the time past, this would be in effect to forbid it for the time to come.<sup>f</sup>

## XXVI.

65. *How Persons acquire Rights by the Effect of Laws.*—When.

\* Thus, in the ancient Roman law, the license which fathers had to take away the lives of their children did not extend to the license of depriving them of their liberty, and making them slaves. *Libertati a majoribus tantum impensum est, ut patribus, quibus jus vitæ in liberos necisque potestas olim erat permissa, libertatem eripere non liceret. L. ult. C. de patr. potest.* Thus, in the same Roman law, it was lawful for a man to give to his concubine, but not to his wife. *V. l. 58, et tot. tit. D. de donat. inter vir. et uxor.* Thus, by the same law, a husband was allowed to sell the lands which he got with his wife in marriage, if she consented to it; but he could not mortgage them, not even with her consent. *Lex Julia fundi dotalis Italici alienationem prohibebat fieri a marito non consentiente muliere: hypothecam autem, nec si mulier consentiebat. L. vi. § 15, C. de rei ux. act.*

<sup>f</sup> Cum lex in præteritum quid indulget, in futurum vetat. *L. 22, D. de legib.* The law would be very imperfect, if, when it forgives what is past, it should not prohibit it for the time to come. Thus, the edict of 1606, which put a stop to the inquiry after those who had taken interest for money lent, and converted it into rents, did not fail to forbid the taking of all such interest for the future. *V. Nov. 154.*

a right comes to any person by the disposition of a law, this right is acquired by the effect of the law, whether the person knows or does not know the law; and likewise whether he knows or is ignorant of the fact on which depends the right which the law gives him. Thus, the creditor whose debtor happens to die acquires a right against the heir, or executor, although he knows nothing of the death of his debtor, and even although he is ignorant that the law binds the heirs, or executors, or administrators, for the payment of the debts of the persons to whom they succeed. Thus, the son is heir to his father, although he is ignorant of his right to succeed, and knows nothing of the death of his father. And it is a consequence of this rule, that the rights of this nature, which persons acquire by the effect of the law, pass to their heirs, executors, or administrators, if they themselves happen to die before they have used or known their right.<sup>a</sup>

## XXVII.

66. *How One may renounce a Right acquired by a Law.* — It is free for persons that are capable of using their rights, to renounce what the laws have established in their favor. Thus, one that is of age, and under no incapacity, such as madness, or interdiction, may renounce a succession which falls to him by law. Thus, persons who have privileges granted them, either by law or by particular favor, are at liberty not to make use of them.<sup>b</sup> But this liberty of renouncing one's right does not extend to the cases in which third persons have an interest, nor to those where the re-

<sup>a</sup> *L. ult. C. de hered. act.*; — § 3, *inst. per quas pers. nob. acq.*; — l. 18, *C. de jur. deliber.*; — v. l. 5, *D. si pars hered. pet.*; — l. 30, § 6, *D. de acq. vel om. her.*; — d. l. § 1, *et tit. de ventr. in poss. mit.*; — l. 6, *C. de impub. et al. sublat.*; — l. 5, *D. si pars her. pet.*; — d. l. § 1; — l. 30, § 6, *D. de acq. vel om. her.*; — l. 3, § 10, *D. de suis et leg.*; — v. l. un. *C. de his qui ante ap. tab.* We are to understand this rule in the manner that it is expressed, of rights acquired by the disposition of a law, and not in general of what is acquired by other ways, which the laws authorize; as when a legacy is acquired by the will of a testator. On this rule depends that other which is received in the customs of France, that death puts the living into possession; which signifies, that the heirs of blood acquire their right to the succession, although they be ignorant of the death of him to whom they succeed; because it is the law that calls them to the succession. But legatees, and executors of testaments, being called only by the will of the testator, and not by the law, their right is not the same; which difference shall be explained in its proper place, when we come to treat of successions. *V. l. 1, C. de his qui ante ap. tab.*

<sup>b</sup> *L. 51, C. de epis. et cler.*; — l. 29, *C. de pact.*; — l. 46, *D. de pact.*; — v. l. 4, § 4, *D. si quis caut.*; — l. 8, *D. de transact.*; — l. 13, *La comm. pred.* See the next article, and the second article of the fourth section of the *Vices of Covenants*.

nouncing of one's right would be contrary to equity, or good manners, or prohibited by some law.

## XXVIII.

67. *The Dispositions of particular Persons cannot hinder the Effect of the Law.*—The laws have their effect independently of the will of particular persons. And no person can hinder, either by contracts, or by testament, or otherwise, the laws from regulating what concerns such things. Thus, a testator cannot hinder, by any precaution whatever, the laws from having their effect against any disposition he may make in his testament contrary to law. Thus, contracts that are made against law have no manner of effect.<sup>1</sup>

## XXIX.

68. *Discernment necessary for the Right Use of the Rules.*—From all the rules which have been explained under this title, we may infer this as a last rule; that there is great danger of misapplying the rules of law, if we have not a very ample knowledge of all the particular rules, and of the several views that are necessary for interpreting and applying them aright.<sup>1</sup>

## TITLE II.

## OF PERSONS.

69. *In what Manner the Civil Law distinguishes Persons.*—Although the Roman laws own a sort of equality which the law

<sup>1</sup> L. 38, *D. de pact.*; — l. 20, *D. de religiosis*; — l. 45, § 1, *D. de reg. jur.*; — l. 15, § 1, *D. ad leg. Falc.*; — l. 5, *C. de legib.* The first Novel, chap. 2, towards the close, permits testators to deprive their executors of the Falcidian portion; but this very permission implies that, without it, such a disposition would have been of no force, as being contrary to the law, which requires that the executor should have at least the Falcidian portion, which is the fourth part of the estate. We must not give to the rule explained in this article an extent which may have any thing in it contrary to the preceding article.

<sup>1</sup> *Omnis definitio in jure civili periculosa est. Parum est enim, ut non subverti posset.* l. 202, *D. de reg. jur.* Thus, we ought to take care never to apply a rule beyond its just extent, nor to matters to which it has no manner of relation. Thus, we ought to be apprised of the exceptions which limit the rules. Thus, we ought either to keep to the

of nature establishes among all men,\* yet they distinguish persons by certain qualities, which have a particular relation to the matters of the civil law, and which make that which is called the *state of persons*. These are the qualities which are treated of in the Roman law, under the title *De Statu Hominum*. But we do not find either in this title, or in any other, what it is that properly makes the state of persons. We see only that there are different qualities, such as those of being a freeman, and a slave, a father, and a son; and other qualities, which are said to make the state of persons. But we do not there find any thing that points out to us what is common to all these qualities, which might help us to conceive a just and precise idea of the character necessary to a quality, so as to be able to say that it concerns, or doth not concern, the state of a person.

70. *What is the State of Persons.* — It is this that has engaged us to consider, in all these qualities, what it is they have in common among them, and what it is that distinguishes them from the other qualities, which have not the same effect. And it appears that the distinction of these qualities which make up the state of persons, from those which have no manner of relation to it, is a natural consequence of the order of society, and of the order of the matters treated of in the Roman laws. For as we have seen, in the plan of these matters, that the Roman laws have for their object engagements and successions; we shall likewise see that the qualities which these laws consider, in order to distinguish the state of persons, have also a particular relation to engagements and successions; and that they have all of them this in common, that they render persons capable, or incapable, of all manner of engagements, or of some only, or of successions. Thus, as to engagements, persons that are of full age are capable of all engagements, voluntary and others, of contracts, guardianships, and public employments; and minors are incapable of several sorts of engagements, and particularly of those which do not turn to their advantage. Thus, for successions, children lawfully begotten are capable of inheriting, and bastards are incapable of it; and it will appear in all the other qualities that make up the state of persons, that they give some capacity, or incapacity. So that it

letter of the law, or interpret it according to the rules explained under this title, and to observe the other remarks that have been made in it.

\* Quod ad jus naturale attinet, omnes homines aequales sunt. L. 52, D. de reg. jur.

may be said, that the state of persons consists in this capacity, or incapacity, which it is easy to discern by these qualities; for they are of such a nature, that every one of them is, as it were, in a parallel line to another that is its opposite; and there is always one of the two opposites to be met with in every person. Thus there is nobody but who is a major or a minor; legitimate, or illegitimate. And it is the same thing with respect to all the other qualities, as will appear in the sequel of this title.

71. *Two Sorts of Qualities which make the State of Persons.*—The distinctions made among persons by the qualities which regulate their state are of two sorts. The first is of such as are natural, and regulated by the qualities which nature itself marks, and distinguishes in every person. Thus, it is nature that distinguishes the two sexes and those who are called hermaphrodites. The second sort is of such distinctions as are established by human laws. Thus, slavery is a state that is not natural,<sup>b</sup> but which men have established. And, according to the different distinctions of these two kinds, every person has his state regulated by the order of nature, and that of the law.

72. *A Remark on the State of Persons, with Respect to the Roman Law, and our Practice.*—The reader must observe that we have inserted in this title some distinctions of persons, that are not mentioned in the Roman law, among those which make up the state of persons. For example, it is said in the Roman law, that madness does not change the state of the person<sup>c</sup>; and we see likewise there, that in the title of the *State of Persons*, no mention is made of majority and minority. But, nevertheless, madness and minority are qualities that belong to the state of persons, even according to the principles of the Roman law itself. For in the first book of the Institutes, where distinctions are made between freemen and slaves; between fathers and sons, minors are there likewise considered,<sup>d</sup> as also those who are in a state of madness.<sup>e</sup> And in effect, these persons are under an incapacity, which makes it necessary for them to be placed under the guardianship of a tutor, or curator. Thus, that rule among the Romans, that madness does not change the state of the person, signifies that it does not change the state which is made up

<sup>b</sup> Servitus est constitutio juris gentium, qua quis dominio alieno contra naturam subicitur. L. 4, § 1, D. de stat. hom.

<sup>c</sup> L. 20, D. de stat. hom.

<sup>d</sup> Inst. de tut.

<sup>e</sup> § 3, Inst. de curat.

by the other qualities, and that it does not hinder, for example, a madman from being a freeman and a father. And, in fine, according to the usage among us, if it were made a question, with respect to our practice, whether a person were mad or not, we should call that question a case relating to the state of the person; as we give this name to all the lawsuits in which the chief matter in debate is concerning the state of persons.

## SECTION I.

### OF THE STATE OF PERSONS BY NATURE.

73. *Distinctions of Persons by Nature.*—The distinctions which make the state of persons by nature are founded upon the sex, the birth, and the age of every person; including under the distinctions made by the birth those which depend on certain defects and imperfections in the conformation of the parts of the body, which some persons have from their birth; such as that of both sexes in hermaphrodites, the incapacity of begetting children, and some others. And although some of these defects may happen by accident, after the birth, yet, in what manner soever we consider them, the distinctions which these defects make of persons do still belong to the order of distinctions made by nature, and they have their place in this section.

### ART. I.

74. *Distinction of Persons by the Sex.*—The sex, which distinguishes the man from the woman, makes this difference between them, with respect to their state, that men are capable of all manner of engagements and functions, unless it happen that any one is excluded from them by particular obstacles; and women are incapable, upon the bare account of their sex, of several sorts of engagements and functions. Thus, women cannot exercise the office of a magistrate, nor be witnesses to a testament, nor plead at the bar, nor be guardians, except to their own children. And this makes their condition in many things less advantageous, and likewise in others less burdensome, than that of men.\*

\* *Femine ab omnibus officiis civilibus vel publicis remotæ sunt, et ideo nec iudices esse possunt, nec magistratum gerere, nec postulare, nec pro alio intervenire, nec*



## II.

**75. Distinctions by Birth, and of the Paternal Authority.**—Birth puts children under the power of those of whom they are born.

*procuratores* existere. *L. 2, D. de reg. jur.* Mulier testimonium dicere in testamento non poterit. *L. 20, § 6, D. qui test. facere poss.* Fœminæ tutores dari non possunt, quia ad manus masculorum est, nisi a principe filiorum tutelam specialiter postulent. *L. ult. D. de tut.* In multis juris nostri articulis deterior est conditio foeminarum, quam masculorum. *L. 9, D. de stat. hom.*

By the ancient Roman law, in the law of the Twelve Tables, women were under perpetual guardianship, which was afterwards abolished. *V. in fragm. 12 tab., tit. 18, § 6;—Ulp., tit. 11, § 18.* And by the same law, women did not inherit, not even to their own children, nor their children to them; which was likewise abrogated. *Instit. de Senat. Tert.* And by the decree of the senate called the *Velleian Decree*, women could not be sureties for other persons. *Tit. D. et Cod. ad Senat. Vell.* Which has been abolished in the greatest part of the provinces of this kingdom, by the edict of the month of August, 1606, which has forbidden the usage of expressing in the obligations of women their renouncing the Velleian privilege, and which has declared their obligations to be valid, without the said renunciation.

By our custom married women are under the power of their husbands. And this is agreeable both to the natural and divine law. "Thy desire shall be to thy husband, and he shall rule over thee." *Gen. iii. 16.* "Wives, submit yourselves unto your own husbands, as unto the Lord. For the husband is the head of the wife." *Eph. v. 22, 23;—1 Cor. xi. 3;—1 Pet. iii. 1.* It is because of this power that the husband hath over his wife, that, by our custom, she cannot bind herself without the authority of her husband, except in certain cases. Thus, a wife who is a public merchant, and drives a trade separate from that of her husband, may oblige herself without his express authority. For it is with the consent of the husband that she carries on that trade. Thus, in some provinces in France, wives may oblige themselves without the authority of their husbands as to the goods which they have, besides those which are part of their marriage portion. See the fourth section of the title of *Dowries*.

It is likewise because of this power which the husband has over the wife, that in some provinces married women cannot oblige themselves in any respect, not even with the consent and authority of the husband, for fear lest he should use his authority to force his wife to part with all her dower, or at least with some share of it.

The husband had not this authority over his wife by the Roman law, where the wife remained still in the power of her father, unless he emancipated her when he gave her in marriage. *L. 5, Cod. de cond. insert. tam leg. quam fid.;—l. 7, Cod. de nupt.;—l. 1, Cod. de bon. que lib.;—l. 1, § 1, D. de agn. lib.;—l. 1, § ult. D. de lib. exhib.* And instead of this power of the husband over the wife, and the effects which we give it, the Roman law enjoined only a dutiful respect, and such services as are inseparable from this duty. *Cujus matrimonio consensit, in officio mariti esse debet. L. 48, D. de op. lib.* *Recepta reverentia que maritis exhibenda est. L. 14, in fin. D. sol. matr.* For we must not consider as a usage of the Roman law, which is to be applied to ours, that ancient way of celebrating marriage among the Romans, which by their ancient law placed the wife under the power of the husband, in the same manner as children are in the power of the father, and which made her even succeed as heiress to her husband. *V. tit. 22, Ulp. § 14, et tit. 9.* But as to our custom, which makes the consent of the husband necessary to validate the obligation of his wife, in the places and in the cases where she can be bound, it was not the same in the Roman law. For, on the contrary, we see in the sixth law, *Cod. de revoc. donat.*, that in the case of a deed of gift made by a wife to her son, in the absence of her husband, she, being de-

And the natural effects of this power are settled by nature, and the divine law, which mark out the duties of children to their parents.<sup>b</sup> But there are some effects which the civil law gives to the power of parents over their lawful children. And these effects make a particular character of the paternal power,<sup>c</sup> which constitutes the state of sons that are subject to the father's authority; the distinction of which shall be explained in the second section.

### III.

76. *Lawful Issue, and Bastards.*—Children lawfully begotten are those who are born of a marriage lawfully contracted.<sup>d</sup> And bastards are such as are born out of lawful wedlock.<sup>e</sup>

### IV.

77. *Stillborn Children.*—Children that are born dead are considered as if they had never been born, or conceived.<sup>f</sup>

sirons afterwards to revoke the donation, alleged that it was done in her husband's absence; but it is there said, that the husband's absence did not hinder the effect of the donation, and that the wife had power to dispose of her own estate without the husband's consent. *Desine postulare, ut donatio, quam perfecimus, revocetur prætextu mariti et liberorum absentiae, cum hujus firmitas ipsorum præsentia non indigeat. D. l.*

We shall not here enlarge any further on the power and authority of the husband, either by the Roman law or by our custom. But we have been obliged to make these remarks on the differences between our custom and the Roman Law, with respect to the state of woman; because they are the foundation of the rules which we observe for the capacity or incapacity of women, as to engagements.

<sup>b</sup> *Exod. xx. 12*; — *Ecclus. vii. 28*; *iii. 7*.

<sup>c</sup> *Inst. de patr. potest*; — *l. 3, D. de his qui sui vel al. jur. sunt*; — § 2, *Inst. de patr. potest*.

<sup>d</sup> *L. 6, D. de his qui sui vel al. jur. sunt*.

<sup>e</sup> *L. 23, D. de stat. hom.*; — *Deut. xxiii. 2*. Marriage being the only lawful way appointed for the propagation of mankind, it is but just to distinguish the condition of bastards from that of children lawfully begotten. And it is because of this distinction, that the laws declare bastards incapable of succeeding to persons who die intestate; and as they cannot inherit to any person, they being reckoned to be of no family, so nobody succeeds to them, but their own lawful issue; as shall be explained in its proper place. See the Ordinance of *Charles VI.* of 1386.

<sup>f</sup> *L. 129, D. de verb. sign.*; — *l. 2, Cod. de post. hered. inst.* Stillborn children are so much considered to be in the same condition as if they had never been conceived, that the inheritances which fell to them while they were alive in their mother's womb go to the persons to whom they would have belonged, if these children had never been conceived. And they do not transmit such inheritances to their heirs, because the right which they had to them was only an expectation, which implied a condition that they should come alive into the world, to be capable of them. See hereafter, art. 6.

## V.

**78. Abortive Children.**—Abortive children are such as by an untimely birth are born either dead, or incapable of living.<sup>s</sup>

## VI.

**79. Children Unborn.**—Children who are still in their mother's womb have not their state determined; neither ought it to be, but by the birth. And till they are born they cannot be reckoned in the number of children; not even for the benefit of their fathers, in order to procure to them the rights and advantages which accrue to parents by the number of their children.<sup>h</sup> But the hopes that they will be born alive make them to be considered, in whatever concerns themselves, as if they were already born. Thus, the inheritances which fell to them before their birth, and which belong to them, are kept for them; and curators are assigned to them, to take care of these inheritances for their behoof.<sup>1</sup> Thus, the mother who procures her own abortion is punished as a murderer.<sup>1</sup>

## VII.

**80. Posthumous Children.**—Posthumous children are those that are born after the death of their father, and who by this birth are distinguished from those who are born during the father's lifetime, in that posthumous children are never under the power of their

<sup>s</sup> The state of abortive children may be considered under two views. One is to know if, when they are lawfully begotten, and born alive, they are capable of inheriting, and transmitting an inheritance to their heirs, which shall be explained in its place. The other is to know how long a woman must be pregnant, before the child comes to that maturity as that it may be able to live; and this serves to determine, whether children who live, although born before the ordinary time, reckoning from the day of the marriage, ought to be reputed lawfully begotten, or not. We reckon those to be lawfully begotten, who live, although they be born in the beginning of the seventh month after the marriage. De eo qui centesimo octogesimo secundo die natus est, Hippocrates scripsit, et divus Pius Pontificibus rescripsit, justo tempore videri natum. L. 3, § ult. D. de mis. et legat. hered. Septimo mense nasci perfectum partum jam receptum est, propter anetoritatem doctissimi viri Hippocratis; et ideo credendum est, eum, qui ex justis nuptiis septimo mense natus est, justum filium esse. L. 12, D. de stat. hom.

<sup>h</sup> L. 1, § 1, D. de inspect. vent.; — l. 9, in f. D. ad leg. Falc.; — l. 2, D. de mort. infer.; — l. 7, D. de stat. hom.; — l. 2, § 6, D. de excus.; — v. l. 26, D. de stat. hom.

<sup>1</sup> L. 1, D. de vent. in poss. mit.; — l. 8, D. de curat. fur. et al.; — l. 20, D. de tut. et cur. dat. ad his q.

<sup>1</sup> L. 59, D. de pen. What is said in this article, in relation to successions, is to be understood under condition that the children come to be born alive. See the fourth article of this section. So that this state renders their capacity or incapacity of inheriting uncertain, till they are born.

father, and are not of the number of sons subject to the father's authority; of whom mention will be made in the fifth article of the second section.<sup>m</sup>

## VIII.

81. *Children born after their Mother's Death.*—Children that are born after the death of their mothers, and who are taken out of the mother's womb after she is dead, are of the same condition with other children.<sup>n</sup>

## IX.

82. *Hermaphrodites.*—Hermaphrodites are those who have the marks of both sexes; and they are reputed to be of that sex in which nature most prevails in them.<sup>o</sup>

## X.

83. *Eunuchs.*—Eunuchs are those whom a defect of conformation of their members, whether it proceed from their birth, or any other cause, renders incapable of begetting children.<sup>p</sup>

## XI.

84. *Madmen.*—Madmen are those who are deprived of the use of reason, after they have attained the age in which they ought to have it; whether it be that this defect is natural to them from their birth, or has happened by some accident. And seeing this condition renders them incapable of all manner of engagements, and of the management of their estate, they are put under the tuition of a guardian.<sup>q</sup>

## XII.

85. *Persons that are Deaf and Dumb, and others laboring under the like Infirmities.*—Persons that are both deaf and dumb, or those who by other infirmities are rendered incapable of managing

<sup>m</sup> L. 3, § 1, *D. de inj. rupt.*

<sup>n</sup> L. 12, *D. de lib. et post.*; — l. 6, *D. de inoff. test.*

<sup>o</sup> L. 10, *D. de stat. hom.*; — l. 15, § 1, *D. de testib.*; — v. l. 6, in f. *D. de lib. et post.*

<sup>p</sup> § 9, *Inst. de adopt.*; — l. 128, *D. de verb. sign.*; — *Deut. xxiii. 1.* It appears by these texts, who are those that are to be reckoned in the number of eunuchs, and why it is that they are incapable of marriage.

<sup>q</sup> L. 40, *D. de reg. jur.*; — l. 5, *cod.*; — § 3, *Inst. de curat.*; — l. 2 et l. 7, *D. de curat. fur.* See the first article of the first section of *Guardians*, and the thirteenth article of this section.

their affairs, are in such a condition that guardians are appointed to them, as well as to madmen, to take care of their affairs, and of their persons, as occasion requires.\*

## XIII.

86. *How Madness, or Imbecility, does not change the State of Persons.*—Those who labor under madness, or under any of the other infirmities above mentioned, do not lose the state which their other qualities give them. And they retain their dignities, their privileges, the capacity of inheriting, their right to their estates, and likewise such effects of the paternal power as are consistent with that condition.\*

## XIV.

87. *Monsters.*—Monsters, who have not human shape, are not reputed in the number of persons, and are not reckoned as children to their parents.<sup>†</sup> But such as have what is essential to human shape, and have only some excess, or some defect, in the conformation of their members, are ranked with the other children.<sup>‡</sup>

## XV.

88. *A Case in which Monsters are reckoned among the other Children.*—Although monsters who have not human shape are not placed in the number of persons, and are not considered as children, yet they are reckoned as such, when it is for the behoof of the parents, and are allowed to fill up the number of children, to entitle their parents to any privilege or exemption which belongs to fathers or mothers having a certain number of children.<sup>§</sup>

## XVI.

89. *Distinction made by Age.*—Age distinguishes among persons those who have not reason or experience enough to govern themselves, from those to whom age has given such a maturity of rea-

\* § 4, *Inst. de curat.*; — l. 2, *D. de curat. fur.*; — l. 19, in f., l. 20, l. 21, *D. de reb. auct. jud. poss.*

† L. 20, *D. de stat. hom.*; — l. 8, *D. de his qui sui vel al. jur. sunt.*

‡ L. 14, *D. de stat. hom.*

§ D. l. 14.

\* L. 135, *D. de verb. signif.* We may add as another reason of this rule, that these monsters are more chargeable to the parents than their other children.

son, as to enable them to be masters of their own conduct. But because nature does not mark in every one the time of this maturity, the civil law has regulated the times in which persons are judged capable both of marriage and other engagements. And we shall see, in the following section, the distinctions which the law has made of minors and of majors; of those who have attained to the years of maturity, and those who have not.\*

## SECTION II.

### OF THE STATE OF PERSONS BY THE CIVIL LAW.

90. *Distinction of Persons by the Civil Law.*—The distinctions which the civil law makes of the state of persons are those that are established by arbitrary laws; whether it be that these distinctions have no foundation in nature, as that of freemen and slaves; or that some natural qualities have given rise to the said distinctions, such as majority and minority of age.

91. *The Principal Distinctions of Persons in the Roman Law.*—The Roman law considered chiefly three things in every person; that is, liberty, country, and family; and under these three views it made three distinctions of persons. The first, of freemen and slaves; the second, of citizens of Rome, and strangers, or of such as had lost the right of citizen by a civil death; and the third, of fathers of a family, and of sons subject to the father's authority.\* These last two distinctions are in use with us, although the rules we observe in them are different from those of the Roman law. And as to the state of slavery, although there are no slaves in France, yet it is necessary to know the nature of that state. For this reason, we shall set down under this title these three distinctions, together with the others which we have in common with the Roman law.

92. *Some Distinctions in Use with us.—The Nobility.*—We have in France a distinction of persons, which is not in the Roman law, or which is very different from any thing that is to be found there. And since for this reason it is not to be set down in

\* L. 1, D. de min.

\* See the 8th and 9th articles of the 2d section.

\* J. l. 7, § ult. D. de Senator.

the articles of this section, and yet it being considered as belonging to the state of persons, this distinction shall be explained here in a few words. It is that which nobility makes between gentlemen, and those who are not, whom the French call *Roturiers*. Nobility gives to those who are of that order divers privileges and exemptions, and a capacity of holding certain offices and benefices appropriated to gentlemen, and of which those who are not of noble extraction are incapable. Nobility makes likewise in some customs a difference as to successions. This nobility is acquired either by birth, which ennobles all the children of those who are noble; or by certain offices, which ennoble the descendants of those who have enjoyed them;<sup>b</sup> or lastly, by letters of nobility, which are obtained from the king, as a recompense for some signal services.

93. *Burgesses*.—We distinguish in France between the inhabitants of towns, who have certain rights, exemptions, and privileges annexed to the right of citizenship of those towns, with a capacity of bearing offices in them; and the people who live in the country, and in little villages, who have not the same privileges nor the same rights.

94. *Vassal, Subjection to the Court of a Lord of a Manor or Perpetual Lessee*.—To these distinctions we must add those, which are made by some customs, of persons of a servile condition, which distinguishes them from those who are of a free condition, in that they are bound by the said customs to some personal servitudes, which relate to marriages, testaments, and successions. But these servitudes being differently regulated by the said customs, and being unknown in the other provinces, it is not necessary to say any more of them here, and it is enough that we have made this bare remark. To which we must add, that this distinction of these persons of servile condition is not founded on any personal qualities, but barely upon the domicile of the said persons, and the quality of their estates, which are subject to these servile conditions; in the same manner as the qualities of vassal, subjection to the courts of a lord of a manor, a perpetual lessee, who is styled in the Roman law *Emphyteuta*, are not, properly speaking, personal qualities, but consequences either of one's domicile, or of the nature of the lands which he possesses.

<sup>b</sup> V. l. 7, § ult. D. de Senator

95. *Distinction of Persons in Britain. — Nobility. — Commoners.* — It may not be improper to add one word here touching the distinction of persons in Great Britain. The nobility, strictly taken, is what makes up the peerage of Great Britain, and consists of lords spiritual and temporal, who have a seat and vote in parliament, and are divided into five ranks, or degrees, viz. duke, marquis, earl, viscount, and baron. All who are not peers of the kingdom come under the general name of commoners, who may be distinguished into two classes. The first takes in all the gentry, of what denomination soever they be; whether baronets, knights, esquires, or gentlemen. Baronets and knights are made by creation. The honor of baronet is hereditary, and descends to the male issue. That of a knight-bachelor is only personal, and dies with the person on whom the said honor is conferred. The titles of esquire and gentleman are acquired either by birth, by profession, or by certain offices, which enoble those who have served in them, and their descendants. Under the other class may be comprehended the yeomanry, or freeholders, who have lands and tenements of their own, to the value of at least forty shillings a year, all citizens, tradesmen, and day-laborers.

96. *Persons of a Servile Condition.* — To these distinctions we must add another, which is mentioned in our books of the common law, and that is of persons of a servile condition, who are called *villains*, from the Latin word *villa*, a country farm, where they were appointed to do service. Of these bondmen, or villains, there were two sorts in England, one termed a *villain in gross*, who was immediately bound to the person of his lord and his heirs; the other was a villain belonging to a manor, who in the Roman law is called *glebae adscriptilius*, being bound to his lord as a member belonging and annexed to a manor, whereof the lord was owner. There are not, properly speaking, any villains now in England; and therefore it is not necessary to say any more concerning the state of villainage, it being enough barely to have mentioned it.\*

#### ART. I.

97. *Slaves.* — A slave is one who is in the power of a master, and who belongs to him in such a manner, that the master may sell him, dispose of his person, his industry, and his labor; and

\* This and the preceding paragraph were added by the translator.



who can do nothing, have nothing, or acquire any thing, but what must belong to his master.<sup>a</sup>

## II.

98. *Freemen.*—Freemen are all those who are not slaves, and who have preserved their natural liberty; which consists in a right to do whatever we please, except in so far as we are restrained by law, or hindered by some outward violence.<sup>b</sup>

## III.

99. *Causes of Slavery.*—Men become slaves by captivity in time of war, among nations where it is the custom that the conqueror, by saving the life of the person conquered, becomes his master, and makes him his slave. And it is a consequence of the slavery of women, that their children are slaves by their birth.<sup>c</sup>

## IV.

100. *Manumised Persons.*—Manumised persons are those who, having been slaves, are made free.<sup>d</sup>

## V.

101. *Who are Fathers of a Family, and who Sons of a Family.*—The sons and daughters of a family are persons who are subject to the father's authority; and the fathers or mothers of a family, whom we call likewise heads of a family, are the persons who are not subject to the father's authority;<sup>e</sup> whether they have children of their own, or not, and whether they have been freed from the father's authority by emancipation,<sup>f</sup> or by the natural<sup>g</sup> or civil death of the father.<sup>h</sup> And however young these persons

<sup>a</sup> L. 4, § 1, *D. de stat. hom.*; — § 2, *Inst. de jur. pers.*; — § 3, *Inst. per quas pers. cuius acq.*; — l. 1, § 1, *D. de his qui sui vel al. jur. sunt.*

<sup>b</sup> L. 4, *D. de stat. hom.*; — § 1, *Inst. de jur. pers.*

<sup>c</sup> L. 5, § 1, *D. de stat. hom.*; — § 4, *Inst. de jur. pers.* If one who was past twenty years of age suffered himself to be sold, that he might have the price of his liberty, he became a slave by the Roman law, although that law did not allow him at that age to have the power of selling his estate. *Jure civili, si quis se major viginti annis, ad pretium participandum, venire passus est (servus sit).* L. 5, § 1, *D. de stat. hom.*

<sup>d</sup> L. 6, *D. de stat. hom.*; — *Inst. de libert.*

<sup>e</sup> L. 4, *D. de his qui sui vel al. jur. sunt.*

<sup>f</sup> § 6, *Inst. quib. mod. jus patr. pot. solv.*

<sup>g</sup> *Inst. eod.*

<sup>h</sup> § 1, *eod.*; — § 3, *eod.* Concerning the civil death, see art. 12, below.

may happen to be, yet they are considered as heads of a family; so that the several children of one father are so many heads of a family after the father's death.<sup>1</sup>

## VI.

102. *Emancipation does not alter the Natural Right of the Paternal Power.* — Emancipation, and the other ways which set the son or daughter free from under the father's authority, regard only the effects which the civil laws give to the paternal power, but change nothing in those that are of natural right.<sup>1</sup>

## VII.

103. *Who are those that are said to be Masters of their own Rights.* — According to these two distinctions of freemen and slaves, of fathers and sons, there is no person who is not either under the power of another, or in his own; that is to say, master of his own rights.<sup>m</sup> And this does no ways hinder the son that is emancipated from being subject to the authority which the law of nature gives his father over him; nor a minor, who happens to be father of a family, from being under the conduct and authority of a tutor or guardian.

<sup>1</sup> L. 195, § 2, *D. de verb. signif.* The paternal power is the foundation of several incapacities in sons; but which are different in the Roman law and in our customs. Thus, in the Roman law, sons who lived in subjection to the father's authority were first of all incapable of acquiring any thing. But all that they did acquire by any way whatsoever belonged to their fathers, excepting the *peculium*, if the father thought fit to let them have it. And afterwards they had the power of acquiring, and the fathers had the usufruct of all that their sons acquired. And then some exceptions were made, and the fathers had not any longer the usufruct of certain goods. But it is not necessary to explain here all these changes, nor the different kinds of usufruct which fathers have of the goods of their children in the provinces of this kingdom, whether it be under the name of usufruct, or under the name of wardship.

Thus, likewise, in the Roman law, sons who were still under the father's jurisdiction, could not oblige themselves by borrowing money. *Toto tit. ad senatusc. Maced.* Thus, in France, sons subject to the paternal authority cannot marry, without the consent of their fathers and mothers, unless they are upwards of thirty years of age, and daughters after they are past twenty-five years, according to the ordinances of 1556 of Blois, and of 1539.

Thus, in France, marriage emancipates children from the paternal jurisdiction. Whereas under the Roman law the son and daughter that were married remained, nevertheless, under the power of the father, unless he emancipated them when he married them. L. 5, *Cod. de cond. insert. tam in leg. quam in fidei com.*; — l. 7, *Cod. de nupt.*; — l. 1, *Cod. de bon. quæ lib.*

<sup>1</sup> L. 8, *D. de cap. minut.*

<sup>m</sup> *Inst. de his qui sui vel al. jur. sunt*; — l. 1, *D. cod.*; — l. 3, *D. de stat. hom.*

## VIII.

104. *Who are of Ripe Age, and who of Unripe Age.* — Males who have not attained the age of fourteen years complete, and females who are under twelve, are said to be of an unripe age, and are called in the Roman law *Impuberes*. And sons who have attained the age of fourteen years complete, and daughters who are of the age of twelve, are reckoned to be of ripe age, and are distinguished in the Roman law by the name of *Adulti*.<sup>a</sup>

## IX.

105. *Majors and Minors.* — Minors are those of both sexes who are not as yet five-and-twenty years complete; and they are under tutelage till that age. When they have completed the last moment of the five-and-twentieth year, they are then said to be of full age, or majors.<sup>b</sup>

## X.

106. *Prodigals.* — We ought to place in the rank of minors, those persons who are forbid the management of their own affairs, as being prodigals, although they be of full age; because their bad conduct renders them incapable of managing their own estate, and of entering into engagements, which is the consequence of the former. And therefore the care of all their concerns is committed to a guardian.<sup>c</sup>

## XI.

107. *Natural-born Subjects, and Strangers.* — We call natural-born subjects those that are born within the king's dominions, and we reckon those to be strangers who are subjects of another prince, or another state. And strangers of this kind, who have

<sup>a</sup> *Inst. quib. mod. tut. fin.*; — *l. ult. Cod. quand. tut. vel cur. esse des.* It is the puberty, or ripeness of age, that removes the incapacity for marriage, which proceeded from want of years. But the Romans distinguished between this puberty, that is sufficient to make the marriage lawful, and full puberty, which renders it more decent. This full puberty in males is eighteen years complete, and in females fourteen. *L. 40, § 1, D. de adopt.*; — *§ 4, Inst. eod.* As to the other effects of full puberty, *vid. l. 14, § 1, D. de alim. leg.*; — *l. 57, D. de re jud.*; — *l. 1, § 3, D. de postul.*

<sup>b</sup> *L. 3, § 3, D. de min.* We have thought fit to make use here of the word *tutelage*, although by the Roman law adults were out of tutelage, and had curators assigned them, as shall be explained under the title of *Tutors*. But according to our usage in France, tutelage does not expire till the five-and-twentieth year, except in some customs, which fix a shorter period of time for minority.

<sup>c</sup> *§ 3, Inst. de curat.*; — *l. 1, D. de curat. fur.*; — *l. 40, D. de reg. jur.*

not been naturalized by letters patent of the prince, are under the incapacities which are regulated by the ordinances, and by our customs.\*

## XII.

108. *Civil Death.*—Civil death is the state of those persons who are condemned to death, or to other punishments which are attended with the confiscation of goods. And therefore this state is compared to natural death, because it cuts off from the civil life those persons who fall under it, and renders them, as it were, slaves to the punishment which is inflicted on them.†

## XIII.

109. *Professed Monks and Nuns.*—Professed monks, or nuns, are under another kind of civil death, which is voluntary; into which state they enter by their vows, which render them incapable of marriage, or of having any property in temporal goods, or entering into any engagements which are consequences of the same.‡

## XIV.

110. *Clergymen.*—Clergymen are those who are set apart for the ministry of God's worship; such as bishops, priests, deacons, sub-deacons, and those who are called to other orders. And this state, which distinguishes them from laymen, renders them incapable of marriage, in such as are in holy orders, and worketh also other incapacities in the matters of commerce prohibited to the clergy, and entitles them to the privileges and exemptions which

\* L. 17, *D. de stat. hom.*; — Nov. 78, c. 5; — l. 1, *C. de hæc. inst.*; — l. 6, § 2, *D. eod.*; — l. in verbo *Cives Romani*, *D. ad leg. Fulc.*; — v. auth. *omnes peregrini*, *C. comm. de success.*

† In France, strangers, who are called aliens, *alibi nati*, are incapable of successions, and of making a testament. They are not capable of enjoying offices or benefices; and they are under the other incapacities regulated by the ordinances, and by our usage. See the ordinance of 1386, that of 1431, and that of *Bois*, art. 4. We must except from these incapacities some strangers to whom our kings have granted the rights and privileges of natives, and natural-born French.

‡ L. 23, *D. de pæn.*; — § 3, *Inst. quib. mod. jus patr. pot. solv.*; — §§ 1 & 3, *eod.*; — l. 17, *D. de pæn.*; — l. 1, *C. de hæred. inst.*

§ Auth. *ingressi*, ex Nov. 8, cap. 5; — *C. de Sacros. Eccles.*; — Nov. 76. In France, the estates of persons who are professed religious, do not go to the monastery, but to their heirs, or those to whom they are pleased to give them. And they cannot dispose of them for the use of the monastery.

have been granted to them by the canons of the church, by the ordinances, and by the custom of the kingdom<sup>4</sup>

## XV.

111. *Communities.*—Communities, ecclesiastical and secular, are assemblies of many persons united into one body, that is, formed with the prince's consent, without which these kinds of assemblies would be unlawful.<sup>1</sup> And these bodies, and corporations, such as chapters of churches, universities, monasteries, town corporations, companies of trade, and others, are established for the forming of societies that may be useful either to church,<sup>2</sup> or state;<sup>3</sup> and they are accounted as persons,<sup>4</sup> having their own proper goods, their rights, and their privileges. And among other differences which distinguish them from particular persons, these societies are under some incapacities, which are accessory, and natural to this state: as, particularly that of being incapable of alienating their stock without just cause.<sup>5</sup>

## TITLE III.

### OF THINGS.

112. *In what Manner the Laws consider Things.*—The civil laws extend the distinctions which they make of things to every

<sup>1</sup> *L. 6, C. de Episc. et Cler.*;—Ordinance of St. Lewis, 1228;—Ordinance of Blois, art. 59;—*v. l. 1, & seq. et l. 2, d. tit. C. de Episc. et Cler.*

<sup>2</sup> *L. 1, et l. 2, D. de coll. et corp.*;—*l. 3, § 1, cod.*;—*l. 1, D. quod cujusque univ.*;—*l. 2, D. de extr. crim.*

<sup>3</sup> *L. 1, § 1, D. de coll. et corp.*;—*tot. tit. C. de Episc. et Cler.*

<sup>4</sup> *L. 1, D. quod cujusque univ.* As to town corporations, *v. l. 3, D. quod cujusque univ.*;—*tit. D. ad Munici.*

<sup>5</sup> *L. 22, D. de fidejus.*

<sup>6</sup> Ecclesiastical and lay communities being established for a public good, and with an intent that they should last always, they are forbidden to alienate their goods without just cause. *L. 14, C. de Sac. Eccl.* And it is because of this perpetuity, and of these prohibitions to alienate, that lands which come into the possession of communities are said to be in mortmain, that is, in a dead hand; because what they once acquire, remaining always in their possession, the king and lords of manors lose their services, and the profits due to them upon the change of their vassals, and upon alienation of the lands. It is for this reason that they are not permitted to acquire immovables, without paying to the king a consideration for a license of mortmain, and some acknowledgment to the

thing that God hath created for the use of man. And as it is for our use that he hath made the whole world, and that he destines for the supplying of our wants every thing that is here on the earth below, or in the heavens above; \* it is this destination of all things to our different wants which is the foundation of the different manners in which the laws consider and distinguish the different kinds of things, in order to regulate the several uses and commerce which men make of them.

113. *The Foundations of the Distinctions of Things.* — The divine providence, which forms a universal society of mankind, and which divides it into kingdoms, towns, and other places, and settles in every one the families and the particular persons who compose them, does likewise distinguish and dispose in such a manner all the things that are for the use of man, that many things are common to all mankind; others common to one kingdom; some to a town, or some other place; and other things enter into the possession and commerce of particular persons.

114. It is these distinctions of things, and the other different ways in which they have relation to the use and commerce of men, that shall be the subject-matter of this title. And because there are some distinctions of things, which are altogether natural, and others which have been established by laws, we shall explain in the first section of this title the distinctions made by nature, and in the second, those that are made by the laws of men.

## SECTION I.

### DISTINCTIONS OF THINGS BY NATURE.

#### ART. I.

115. *Things common to all.* — The heaven, the stars, the light, the air, and the sea, are all of them things belonging so much in common to the whole society of mankind, that no one person can make himself master of them, nor deprive others of the use of them. And likewise the nature and situation of all these things is entirely proportioned to this common use for all men.\*

lord of the manor, for the loss of the perquisites that would accrue by the future changes of masters. See the ordinances of Philip III. 1275, Charles VI. 1372, and others.

\* Deut. iv. 19; — *Wisd. of Sol.* ix. 2.

\* Deut. iv. 19; — § 1, *Inst. de rer. div.*; — l. 2, § 1, *D. eod.* It is to be remarked on this

## II.

116. *Things public.* — Rivers, the banks of rivers, highways, are things public, the use of which is common to all particular persons, according to the respective laws of countries. And these kinds of things do not appertain to any particular persons, nor do they enter into commerce.<sup>b</sup> But it is the sovereign that regulates the use of them.

## III.

117. *Things belonging to Towns, or other Places.* — We reckon among the number of public things, and of such as are out of commerce, those which belong in common to the inhabitants of a town, or other place, and to which particular persons can have no right of property; such as the walls and the ditches of a town, town-houses, and public market-places.<sup>c</sup>

## IV.

118. *Distinction of Immovables and Movables.* — The earth being given to men for their habitation, and for the production of all things necessary for supplying all their wants; we distinguish in it the portions of the surface of the earth which every one occupies, from the things that may be separated from it, for our use.

article, and the two following, that our laws differ from the Roman law in regulating the use of the seas, except in so far as concerns that natural use of them, in the communication which all nations have with one another, by a free navigation over all the seas. Thus, whereas the Roman law allowed every body indifferently to fish, both in the sea, and in the rivers, § 2, *Inst. de rer. div.*, in the same manner as it allowed hunting, § 12, *cod.*, our laws prohibit them. And our ordinances have made several regulations concerning them; the origin of which is owing, among other causes, to the necessity of preventing the inconveniences of allowing a liberty of hunting and fishing to all sorts of persons. And we must observe in general, touching the use of the seas, seaports, rivers, highways, the walls and ditches of towns, and of other things of the like nature, that several regulations have been made in them by our ordinances; such as those that concern the admiralty, rivers, forests, hunting, fishing, and others of the like nature, which do not belong to the matters that come within the compass of this design.

<sup>b</sup> § 2, *Inst. de rer. div.*; — § 4, *cod.*; — § 5, *cod.*; — l. 2, § 22, *D. ne quid in loc. publ. vel itin. f.*; — l. 2, *D. de via publ.* See the remark on the preceding article.

<sup>c</sup> § 6, *Inst. de rer. div.*; — l. 1, *D. cod.*; — § 10, *Inst. cod.*; — v. l. 8, § 1, *D. de div. rer.*; — l. 9, § 3, *cod.*; — l. ult. *cod.* See the remark on the first article. In the Roman law they called the walls and the gates of towns things holy; which is not to be understood in the sense which this word is commonly taken in, but in the sense explained in the text cited on this article.

The distinction of the things mentioned in this article belongs more properly to the order of laws, than of nature. However, seeing it hath its foundation in nature, and that it has relation to the preceding article, we have put it down here.

And it is this that makes the distinction of what we call immovables, and movables,\* or goods movable.<sup>d</sup>

## V.

119. *Immovables.*—Immovables are all the parts of the surface of the earth, in what manner soever they are distinguished; whether into places for buildings, or into woods, meadows, arable land, vineyards, orchards, or otherwise, and to whomsoever they belong.<sup>e</sup>

## VI.

120. *Trees and Buildings.*—We comprehend likewise under the name of immovables every thing that is adherent to the surface of the earth, either by nature, as trees; or by the hand of man, as houses, and other buildings; although these kinds of things may be separated from the earth, and become movable.<sup>f</sup>

## VII.

121. *The Hanging Fruits are a Part of the Ground.*—The fruits hanging by the root, that is, such as are not as yet gathered, nor fallen, but which stick to the tree, are part of the ground.<sup>g</sup>

## VIII.

122. *Accessories to Buildings.*—Whatever sticks to houses, and other buildings, such as any thing that is fastened with iron, lead, plaster, or any other manner of way, to the intent that it may always continue so, is reputed to be immovable.<sup>h</sup>

## IX.

123. *Movables.*—Movables are all those things that are disjoined from the earth and the waters; whether it be that they have been separated from it, as trees that are fallen, or cut down, fruits that are gathered, stones taken out of a quarry; or that they

<sup>d</sup> L. 1, D. de œd. ed.;—l. 8, § 4, C. de bon. quæ lib.;—l. 30, C. de jur. dot.;—l. 93, D. de verb. sign.

<sup>e</sup> L. 1, D. de œd. ed.;—l. 17, § 8, D. de act. empt. et vend.

<sup>f</sup> See the two following articles.

<sup>g</sup> L. 44, D. de rei vend.

<sup>h</sup> L. 17, D. de act. empt. et vend.;—d. l. § 3;—d. l. § 9;—d. l. § 7.



are by nature distinct and separate from the earth, and from the water, as living creatures.<sup>1</sup>

## X.

124. *Movables, living and dead.* — Movable things are of two sorts. There are some which live, and move themselves, as animals; and the things that are inanimate are called dead movables.<sup>1</sup>

## XI.

125. *Animals, wild and tame.* — Animals are of two sorts. One is of those that are tame, and serve for the ordinary use of men, and are in their power; such as horses, oxen, sheep, and others. The other sort is of those animals that live in their natural liberty, out of the power of man; such as the wild beasts, fowls, and fishes. And the animals of this second sort are applied to the use, and come into the power of men, by hunting and fishing, according as the use of these sports is permitted by the laws.<sup>2</sup>

## XII.

126. *Movable Things that are consumed by Use.* — In movable things we distinguish those that may be used, and yet kept entire; such as a horse, a suit of hangings, tables, beds, and other things of this kind; from such as we cannot use without consuming them, such as fruits, corn, wine, oil, and the like.<sup>3</sup>

## SECTION II.

## DISTINCTIONS OF THINGS BY THE CIVIL LAWS.

127. *Difference between the Distinctions of the foregoing Section, and those in this.* — Although the distinctions of things which have been explained in the foregoing section have been made by the civil laws, yet it was proper to separate them from the distinctions that are treated of in this section. For those in the preceding

<sup>1</sup> L. 1, D. de ædil. ed. See the fourth article of this section.

<sup>2</sup> L. 1, D. de æd. ed.; — l. 30, C. de jur. dot.; — l. 93, D. de verb. signif.

<sup>3</sup> § 12, Inst. de rer. divis. We must understand this according to the ordinances which relate to hunting and fishing.

<sup>4</sup> L. 1, D. de usufr. ear. rer. quæ us. cons. v. min.

section are formed by nature, and the laws have only taken notice of them, or added something to them; as, for example, what has been explained in the third and eighth articles. But these treated of in this section owe their chief establishment to the laws.

## ART. I.

128. *Distinction of Things that enter into Commerce, and those that do not.*—The laws reduce all things to two kinds. One is of those that do not enter into commerce, and which cannot belong to any one in particular; such as those that have been explained in the first three articles of the preceding section. The other sort is of such as enter into commerce, and of which any one may become master.<sup>a</sup>

## II.

129. *Things consecrated and set apart for Divine Worship.*—Religion, and the civil laws, which are conformable to it, distinguish the things which are destined to divine worship from all others. And among those which are made use of in this worship, we distinguish between things that are consecrated, such as churches and the communion cups, and things that are religious and holy, such as church-yards, the ornaments, oblations, and other things dedicated to the service of God. And all these kinds of things are out of commerce, while they continue under this destination to the divine service.<sup>b</sup>

## III.

130. *Things corporeal and incorporeal.*—The civil laws make another general distinction of things, into those that are sensible and corporeal, and those which we call incorporeal, in order to distinguish from every thing that is sensible certain things which owe their nature and their existence wholly to the laws; such as an inheritance, an obligation, a mortgage, a usufruct, a service; and, in general, every thing that consists only in a certain right.<sup>c</sup>

## IV.

131. *Allodial Lands, and Lands burdened with Quitrents or*

<sup>a</sup> *Inst. de rer. div.*; — l. 1, *D. eod.*

<sup>b</sup> *L. 1, D. de div. rer.*; — § 8, *Inst. de rer. div.* See the sixth article of the eighth section of the *Contract of Sale*, concerning the sale of things consecrated.

<sup>c</sup> *Inst. de reb. corp. et incorp.*; — § ult. *eod.*; — l. 1, § 1, *D. de div. rer.*

*other Duties.*— Among the immovables that are in commerce, and serve for the common use of men, there are some which particular persons may possess fully in their own right, without any burden. And there are other immovables, which are burdened with certain duties and services, that are inseparable from them. Thus, we have in this kingdom lands which are called allodial, or free lands, which pay neither quitrent, nor any other such acknowledgment.<sup>d</sup> And there are other lands, which, having been given away originally with the charge of paying a quitrent irredeemable,<sup>e</sup> or upon other conditions, such as those of fiefs, descend to all sorts of possessors, with the burdens annexed to them.

## V.

132. *Mines.*— We may reckon among lands which particular persons cannot possess fully in their own right, those in which there are mines of gold, silver, and other metals, or matters in which the prince has a right.<sup>f</sup>

## VI.

133. *Coin.*— We may place among things distinguished by the laws, the public coin, which is a piece of gold, silver, or other metal; the form, weight, and value of which are regulated by the prince, in order to make it the price of all things that are in commerce.<sup>g</sup>

<sup>d</sup> *L. ult. § 7, D. de censib.*

<sup>e</sup> De tributis, stipendiis, censibus, et prædia juris italici. *V. tit. 19, Ulp. de dom. et acq. rer.*; — § 40, *Inst. de rer. div.*; — l. 13, *D. de impensis in res dot.*; — l. 27, § 1, *D. de verb. signif.*; — l. 1, *C. de usuc. transform.*; — *toto tit. D. de censib.*; — *toto tit. C. si propt. publ. pens.* The origin of these burdens upon estates in the Roman law was a consequence of the conquests of provinces made by the Romans, of which they distributed the lands to such persons as they thought would remain faithful to the Roman empire; but upon condition that the possessors should pay a certain tribute, to which the lands of Italy were not subject, nor those likewise of some other provinces, which were distinguished by exemptions from such tribute. *d. tit. de censib.*

There are some provinces in France, in which all the lands are reputed allodial, free from all burden of quitrent, or other, unless they are subjected to it by some title; and others, where they have no such thing as allodial lands.

We must not reckon in the number of estates clogged with burdens, those which are liable to pay tithes to the church. For this is a burden of another nature, and from which the possessors of allodial lands are not exempt.

<sup>f</sup> *L. 3, C. de metallar. et metal.* See the ordinance of Charles IX. of 1565, and others concerning mines.

<sup>g</sup> *L. 1, D. de contr. empt*

## VII.

134. *Treasure*. — The laws distinguish likewise that which we call a treasure; which is, according to the definition given of it in the laws, an ancient deposit of money, or other precious things, that have been deposited time out of mind in some hidden place, where it is discovered by some chance, and whereof the true owner cannot be known.<sup>b</sup>

## VIII.

135. *Another Distinction of several Sorts of Goods*. — Besides the distinctions of things which have been spoken of in the preceding articles, the laws consider under other views, and by other general distinctions, the goods or estates which particular persons are possessed of. Thus, they distinguish, in the estates of particular persons, between those which are of their own purchase, and those that come to them by descent or inheritance; and in estates of inheritance, they make a distinction between the paternal and maternal estates.<sup>1</sup>

## IX.

136. *Purchase*. — We call that estate which one has acquired by his own labor and industry, an estate of purchase.<sup>1</sup>

## X.

137. *Inheritance*. — An estate of inheritance is that which descends to us from the persons to whom we have a right to succeed as heirs.<sup>m</sup>

## XI.

138. *Paternal Estate*. — The paternal estate is that which descends to us from our father, or other ascendants or collateral relations of the father's side.<sup>n</sup>

## XII.

139. *Maternal Estate*. — The maternal estate is that which de-

<sup>b</sup> L. 31, § 1, D. de acq. rer. dom. It is not the business of this place to explain to whom it is that the treasure ought to belong. V. l. un. C. de thesaur.

<sup>1</sup> See the following articles, and the remark on the last.

<sup>1</sup> L. 6, C. de bon. qua lib.; — l. 8, D. pro socio.

<sup>m</sup> L. un. C. de impon. lucr. descr.; — l. 10, D. pro socio; — v. l. 3, C. de bon. qua lib.

<sup>n</sup> L. 16, C. de prob.; — l. 10, D. pro soc.

scends to us from our mother, or other ascendants or collateral relations of the mother's side.\*

\* *L. 1, C. de bon. mat.*; — *l. 3, C. de bon. quæ lib.* Although the texts which are quoted on these last four articles have relation to these several sorts of estates, yet this distinction hath not the same use in the Roman law as it hath in our customs; which make different heirs of estates of purchase, estates of inheritance, paternal estates, and maternal estates. This distinction hath likewise place in the matter concerning the power of redemption.

**THE**  
**CIVIL LAW IN ITS NATURAL ORDER.**

**PART I.**  
**OF ENGAGEMENTS.**



# THE CIVIL LAW.

## PART I.

### OF ENGAGEMENTS.

#### BOOK I.

##### OF VOLUNTARY AND MUTUAL ENGAGEMENTS BY COVENANTS.

140. *The Nature of Covenants.*—Covenants are engagements made by the mutual consent of two or more persons, who make a law among themselves to perform what they promise to one another.

141. *The Use of Covenants.*—The use of covenants is a natural consequence of the order of civil society, and of the ties which God forms among men. For as he has made the reciprocal use of their industry and labor, and the different commerce of things, necessary for supplying all their wants, it is chiefly by the intervention of covenants that they agree about them. Thus, for the use of industry and labor, men enter into partnership, hire themselves, and act differently the one for the other. Thus, for the use of things, when they have occasion to purchase them, or a mind to part with them, they traffic in them by sales, and by exchanges; and when they only want them for a certain time, they either hire or borrow them; and according to their other different wants, they apply to them the different sorts of covenants.

142. *Divers Kinds of Covenants.*—It appears from this general idea of covenants, that the word *covenant* comprehends not only all contracts and treaties of what kind soever, such as sale, exchange, partnership, hiring, and letting to hire, a deposit, and all



other contracts, but likewise all particular pacts that may be added to any contract, such as conditions, charges, reserves, clauses of nullity, and all others. This word *covenant* comprehends likewise the acts by which we make void, or change by a new consent, the contracts, treaties, and pacts by which we are already bound.

143. *The Order of this Book of Covenants.*—It is of all these kinds of covenants that we design to treat in this book. And because there are many rules which agree to all the kinds of covenants, such as those which concern their nature in general, the ways by which they are formed, the interpretation of such as are obscure or ambiguous, and some others; these kinds of common rules shall be the subject-matter of the first title, which shall be of covenants in general. We shall afterwards explain the detail of the particular rules belonging to each kind of covenant, every one under its proper title. And in the last place we shall subjoin a title concerning the vices of covenants, which is a matter essentially necessary to the subjects treated of in this book.

## TITLE I.

### OF COVENANTS IN GENERAL.

#### SECTION I.

##### OF THE NATURE OF COVENANTS, AND THE WAYS BY WHICH THEY ARE FORMED.

###### ARTICLE I.

144. *The Meaning of the Word "Covenant."*—This word *covenant* is a general name, which comprehends all manner of contracts, treaties, and pacts, of what kind soever.\*

###### II.

145. *Definition of a Covenant.*—A covenant is the consent of two or more persons<sup>b</sup> to enter into some engagement among

\* L. 1, § 3, D. de pact.

<sup>b</sup> L. 1, § 2, D. de pact.

themselves,<sup>c</sup> or to dissolve a former engagement, or to make some change in it.<sup>d</sup>

### III.

146. *The Subject-matter of Covenants.*—The subject-matter of covenants is the infinite diversity of the voluntary ways by which men regulate among themselves the communication and commerce of their industry and labor, and of all things, according to their wants.<sup>e</sup>

### IV.

147. *Four Sorts of Covenants, by Four Combinations of the Use of Persons and Things.*—The commerce and communications for the use of persons and things are of four sorts, which make four kinds of covenants. For those who treat together either give to one another reciprocally one thing for another,<sup>f</sup> as in a sale, and in an exchange; or they do one thing for another,<sup>g</sup> as if they undertake the management of one another's concerns; or otherwise one of the parties does something, and the other gives something,<sup>h</sup> as when a laborer gives his labor for a certain hire; or, lastly, one of them either does or gives something, the other neither doing nor giving any thing, as when a person undertakes without any gratuity to manage the affairs of another;<sup>i</sup> or that one gives another something out of mere liberality.<sup>j</sup>

### V.

148. *No Covenant obligatory without a Cause.*—In the first three sorts of covenants, the transaction between the parties is not gratuitous, the engagement of one of the parties being the founda-

<sup>c</sup> *D. l. § 3; — l. 3, D. de obl. et act.*

<sup>d</sup> *L. 35, D. de reg. jur.; — § ult. Inst. quib. mod. toll. obl.*

<sup>e</sup> *L. 1, § 3, D. de pact.; — § ult. Inst. de verb. obl.*

<sup>f</sup> *Aut do tibi, ut des. L. 5, D. de prescrip. verb.*

<sup>g</sup> *Aut facio, ut facias. D. l.*

<sup>h</sup> *Aut facio, ut des. D. l. Aut do, ut facias. D. l. Stipulationum quedam in dando, quedam in faciendo consistunt. L. 2, D. de verb. obl.; — L. 3, D. de obl. et act.*

<sup>i</sup> *L. 1, § 4, D. mand.*

<sup>j</sup> *L. 1, D. de don.; — l. 7, C. de his que ex metuore causa gesta sunt.* In this article we have made only one combination of the case where one does a thing, and the other gives something, whereas the Roman law distinguishes it into two; one, where one of the parties does something, and the other gives; and the other, where one of the parties gives, and the other does something for it. But in effect it is only one bare character of a covenant, and one simple combination of giving on one side, and doing on the other, who-

tion of the engagement of the other. And even in the covenants where only one of the parties seems to be obliged, as in the loan of money, the obligation of the borrower is always preceded by the lender's delivering what he gives in credit, before any covenant is formed. Thus, the obligation which is contracted in these kinds of covenants, which are for the benefit only of one of the parties covenanting, hath always its cause from something that is either done or to be done by the other party:<sup>m</sup> and the obligation would be null, if it were really without any cause.<sup>n</sup>

## VI.

149. *Donations have their Cause.*—In donations, and in the other contracts where one party alone does or gives something, and where the other neither does nor gives any thing, it is the acceptance that forms the covenant.<sup>o</sup> And the engagement of the donor hath for its foundation some just and reasonable motive; such as some good office done by the donee, or some other merit in him,<sup>p</sup> or even the bare pleasure of doing good to others.<sup>q</sup> And this motive stands in place of a cause, on the part of the person who receives the benefit, and gives nothing.<sup>r</sup>

## VII.

150. *Some Covenants have a Proper Name, and others not; but they all oblige to what is agreed on.*—Of these different kinds of covenants, some are of so frequent use, and so well known everywhere, that they have a proper name; such as a sale, a loan, hiring, and letting to hire, a deposit, partnership, and others.<sup>s</sup> There are likewise some covenants which have no proper name; as if one person gives to another a thing to sell at a certain price, on condition that he shall keep to himself whatever he gets over and above the price that is fixed.<sup>t</sup> But all covenants, whether

soever of the two parties it is that begins on his side to do or to give. And the distinction of this case that was made in the Roman law, being founded upon a reason which is not in use with us, it is not necessary to explain it here.

<sup>m</sup> L. 5, D. de præscr. verb.; — l. 19, D. de verb. sign.; — l. 1, D. de reb. cred.

<sup>n</sup> L. 7, § 4, D. de pact.; — l. 1, D. de cond. sine causa.

<sup>o</sup> L. 8, § 3, D. de bon. lib.; — l. 10, D. de don.; — l. 19, § 2, eod.

<sup>p</sup> L. 9, D. pro soc.; — l. 5, D. de donat.

<sup>q</sup> L. 1, D. de don.

<sup>r</sup> L. 3, eod.

<sup>s</sup> L. 1, § ult. D. de pact.

<sup>t</sup> L. 4, D. de pr. verb.; — l. 13, D. de pr. verb.; — v. d. l. § 1.

they have a peculiar name or not, have always their effect, and oblige the parties to what is agreed on.<sup>a</sup>

## VIII.

151. *Consent makes the Covenant.* — Covenants are perfected by the mutual consent of the parties, which they give to one another reciprocally.<sup>a</sup> Thus, a sale is perfected by the bare consent of the parties, although the merchandise be not delivered, nor the price paid.<sup>b</sup>

## IX.

152. *Covenants which oblige by the Intervention of a Thing.* — In the covenants which oblige the party to make restitution of what he has received, whether it be of the same individual thing, as in the case of a loan of a thing to be restored in specie, or a deposit; or whether restitution is to be made, not of the same individual thing, but of something of the same kind, as in the loan of money or provisions; the obligation is not contracted but when the consent of the parties is accompanied with the delivery of the thing. And it is for this reason that it is said, that these kinds of obligations are contracted by the intervention of the thing,<sup>a</sup> although the consent of the parties be also necessary.<sup>b</sup>

## X.

153. *Covenants either Written or Unwritten.* — The consent which makes the covenant is either in writing, or without it.<sup>b</sup> The unwritten covenant is made either by the interposition of words, or by some other way, which signifies or presupposes the consent. Thus he who receives a deposit, although he do not speak, obliges himself to the engagements of depositaries.<sup>c</sup>

<sup>a</sup> *L. 1, D. de pact.* It is not necessary to explain here the difference that was made in the Roman law between the contracts which had a name and those which had none. These subtilties, which are not in use with us, would perplex the reader to no purpose.

<sup>b</sup> *L. 2, § 1, D. de obl. et act.*; — *l. 48, eod.*; — *l. 52, § 9, eod.*

<sup>c</sup> *Inst. de empt. et vend.*; — *l. 1, D. de pact.* As to the accomplishment of covenants, see the next article, and the second article of the first section and tenth article of the second section of the *Contract of Sale*.

<sup>a</sup> *Inst. quib. mod. re contr. obl.*; — *§ 2, eod.*; — *§ 3, eod.*; — *l. 1, §§ 2, 3, 4, 5, D. de obl. et act.*; — *l. 2, D. de reb. cr.*

<sup>b</sup> *L. 4, D. de obl. et act.*; — *l. 1, § 3, D. de pact.*

<sup>c</sup> *Inst. de empt. et vend.*; — *§ 1, Inst. de obl. ex cōns.*; — *l. 2, § 1, D. de obl. et act.*; — *l. 17 C. de pact.*

<sup>a</sup> *L. 2, D. de pact.*; — *l. 52, § 10, D. de obl. et act.*; — *l. 17, C. de pact.*

## XI.

154. *Written Covenants made either before a Notary Public, or signed only by the Parties.*—Written covenants are made either in the presence of a public notary,<sup>d</sup> or only signed and sealed by the parties themselves; whether it be that the whole deed is written by the parties who covenant, or that they barely put their names to it.<sup>e</sup>

## XII.

155. *Proofs of Unwritten Covenants.*—If the truth of an unwritten covenant is called in question, it may be proved either by witnesses, or by the other ways which are prescribed in the rules concerning proofs.<sup>f</sup>

## XIII.

156. *Covenants made before a Notary carry their Proof along with them.*—Covenants made before a notary public carry along with them the proof of their truth, by the signature of the public officer.<sup>g</sup>

## XIV.

157. *Verification of a Sign Manual that is contested.*—If the signature of a covenant that is signed only by the parties is contested, it must be proved.<sup>h</sup>

## XV.

158. *What perfects Covenants made before a Notary.*—Covenants which are made in the presence of a public notary are not perfected till all is written, and till those persons who ought to sign it have set their hands to it, and the notary his.<sup>i</sup>

<sup>d</sup> L. 16, C. de fide instr.; — Inst. de empt. et vend.

<sup>e</sup> Inst. de empt. et vend.; — d. l. 16, C. de fide instr.

<sup>f</sup> L. 9, l. 10, et seq. C. de fide instr. By the Roman law, all unwritten covenants were good. But the ordinance of Moulins, Art. 54, and that of 1667, Tit. 20, Art. 2, have forbidden the receiving proofs of unwritten covenants exceeding the value of one hundred livres.

<sup>g</sup> V. l. 16, C. de fide instr.; — Inst. de empt. et vend. Contracts made before notaries have summary executions. Ordinance of 1539, Art. 65 and 66.

<sup>h</sup> V. l. 17, G. si cert. petat. Ordinance of 1539, Art. 92.

<sup>i</sup> L. 17, C. de fide instr.; — Inst. de empt. et vend. For the forms of contracts, see the ordinances of 1539, Art. 67; Orleans, Art. 84; Blois, Art. 165, &c.

## XVI.

159. *Covenants made between Absent Persons.*—Covenants may be made, not only between persons who are present, but likewise between those that are absent,<sup>1</sup> by proxy,<sup>m</sup> or other mediator,<sup>n</sup> or even by letter.<sup>o</sup>

## SECTION II.

OF THE PRINCIPLES WHICH ARISE FROM THE NATURE OF COVENANTS, AND OF THE RULES FOR INTERPRETING THEM.

## ART. I.

160. *Who may enter into Covenants, and of what Sort they must be.*—Seeing covenants ought to be proportioned to the wants to which they have relation, they are therefore arbitrary, and such as the parties please to make them; and all persons may enter into all manner of covenants,<sup>a</sup> provided only that the person be not incapable of contracting,<sup>b</sup> and that the covenant have nothing in it contrary to law and good manners.<sup>c</sup>

## II.

161. *Covenants ought to be made willingly and willingly.*—Covenants being voluntary engagements which are formed by the consent of the parties concerned, they ought to be made with knowledge, and with freedom; and if they want either the one or the other of these characters, as if they are made through mistake,<sup>d</sup> or by compulsion, they are null, according to the rules which shall be explained in the fifth section.<sup>e</sup>

<sup>1</sup> *L. 2, § 2, D. de obl. et act.*; — *l. 2, D. de pact.*

<sup>m</sup> *L. 10, in fine, D. de pact.*

<sup>n</sup> *L. 2, § 2, D. de obl. et act.*; — § 1, *Inst. de obl. ex cons.*; — *l. 2, D. de pact.*

<sup>o</sup> *Id. ll.*

<sup>a</sup> *L. 1, D. de pact.*

<sup>b</sup> Thus, some persons are incapable of all manner of covenants. § 8, *Inst. de inut. stip.*; — *l. 1, § 12, D. de obl. et act.* Others cannot covenant to their prejudice, such as persons under age. *L. 28, D. de pact.*

<sup>c</sup> *L. 6, C. de pact.*; — *l. 7, § 7, D. de pact.*; — *l. 27, § 4, eod.*; — § 23, *Inst. de inut. stip.*; — *l. 7, § 7, D. de pact.* See the fourth section of the *Vices of Covenants.*

<sup>d</sup> *L. 57, D. de obl. et act.*; — *l. 116, § 2, D. de reg. jur.*; — *v. l. 9, D. de contr. empt.*

<sup>e</sup> *L. 116, D. de reg. jur.*; — *v. tit. quod metus causa.* See the title of the *Vices of Covenants.*

## III.

**162. No Persons can covenant for others, nor to their Prejudice.**  
 —Covenants being formed by the consent of parties, no man can covenant for another, unless he has power from him so to do. And much less can any persons do prejudice, by their covenants, to others.

## IV.

**163. 1st Exception. Proxies may covenant for their Constituents.**  
 —Proxies may covenant for those persons from whom they have power so to do;<sup>s</sup> and they may engage them so far as the power reaches which they have received from them.<sup>h</sup>

## V.

**164. 2d Exception. Of those who have a Right to treat for others.**—Tutors and curators, governors and heads of corporations, and masters of companies, factors and agents that are employed in any particular commerce, and all persons who have others subject to their power, or under their conduct, or who represent others, may make covenants in their names, according to the extent of their ministry or power,<sup>l</sup> as shall be explained in its proper place with respect to every one of these kinds of persons.

## VI.

**165. Of him who treats for another, undertaking for his Consent.**  
 —If a third person treats for one that is absent, without his order, but undertakes for his consent, the absent party does not enter into the covenant but when he ratifies it; and if he does not ratify it, the person who undertook for his consent shall be bound, either to pay the penalty to which he submitted, or to make good the damages which he shall have occasioned, according to the na-

<sup>l</sup> L. 88, § 17, *D. de verb. obl.*; — § 18, *Inst. de inut. stip.*; — l. 9, § 4, *D. de reb. cred.*, l. 73, § ult. *D. de reg. jur.*; — l. 3, *C. de ur. pr. mar.*; — l. 10, *D. de jurej.*; — l. 74, *D. de reg. jur.*; — l. 27, § 4, *D. de post.* See the two next articles.

<sup>s</sup> L. 10, in fine, *D. de pact.*

<sup>h</sup> L. 5, *D. mand.*; — l. 3, *coa.* See the second and third articles of the third section of *Proxies.*

<sup>l</sup> L. 15, *D. de pact.*; — l. 14, *D. de pact.* See the fifth and following articles of the second section of *Tutors*; the fifth article of the first section, and the first and third articles of the third section, of *Syndics, Directors, and other Administrators of Companies and Corporations*; the sixteenth and seventeenth articles of the fourth section of *Partnership*; and the first and second articles of the third section of *Persons who drive any Public Trade.*

ture of the covenant, the consequences to which he shall have given occasion, and the other circumstances. But after that the absent person has ratified what was done in his name, although it prove to his prejudice, he cannot afterwards complain of it.<sup>1</sup>

## VII.

166. *Covenants are in Place of Laws.*—When the covenants are finished, whatever has been agreed upon stands in place of a law to those who made them;<sup>m</sup> and they cannot be revoked but by common consent of the parties,<sup>n</sup> or by the other ways which shall be explained in the sixth section.

## RULES FOR THE INTERPRETATION OF COVENANTS.

## VIII.

167. *1st Rule. Obscurities and Doubts are to be interpreted by the Common Intention of the Contractors.*—Seeing covenants are to be formed by the mutual consent of those who treat together, every one of them ought to explain in the covenant sincerely and clearly what he promises, and what he pretends to.<sup>o</sup> And it is by their common intention that we are to explain whatever may be obscure or doubtful in the covenant.<sup>p</sup>

## IX.

168. *2d Rule. Interpretation made by Usage, or by other Ways.*—If the common intention of the parties does not appear from the words of the covenant, and if it can be interpreted by any custom or usage of the place where it was made, or of the persons who made it, or by other ways, we must keep to that which shall appear to be the most probable, under all these views.<sup>q</sup>

## X.

169. *3d Rule. To judge of the Sense of every Clause by the Tenor of the whole Deed.*—All the clauses of covenants are inter-

<sup>1</sup> *L. 9, D. de neg. gest.*; — § 3, *Inst. de inutil. stip.*; — § 20, *cod.*

<sup>m</sup> *L. 23, D. de reg. jur.*; — *L. 1, § 6, D. depositi*; — *L. 1, D. de pact.*; — *L. 34, D. de reg. jur.* See the twenty-second article of this section.

<sup>n</sup> § *ult. Inst. quid mod. toll. obl.*; — *L. 35, D. de reg. jur.*

<sup>o</sup> *L. 39, D. de pact.*; — *L. 21, D. de contr. empt.*; — *L. 99, D. de verb. obl.*

<sup>p</sup> *L. 34, D. de reg. jur.*; — *L. 168, § 1, cod.*

<sup>q</sup> *L. 34, D. de reg. jur.*; — *L. 114, cod.*



puted one by another, in giving to each one the sense which results from the tenor of the whole deed; and even from what is set forth in the preamble to it.<sup>r</sup>

## XI.

170. *4th Rule. The Intention to be preferred to the Expression* — If the words of a covenant appear to be contrary to the intention of the contractors, which is otherwise evident, we must follow this intention, rather than the words.<sup>a</sup>

## XII.

171. *5th Rule. Of Clauses that have a Double Meaning.* — If the words of a covenant have a double meaning, we must take that which is most conformable to the common intention of the contractors; and which has the greatest affinity to the subject-matter of the covenant.<sup>b</sup>

## XIII.

172. *6th Rule. Interpretation in Favor of him who is obliged.* — The obscurities and uncertainties of the obligatory clauses are to be interpreted in favor of him that is obliged, and we must always restrain the obligation to the sense which diminishes it.<sup>c</sup> For he that obliges himself is willing only to be engaged for as little as he can, and the other party ought to have taken care to have it clearly explained what he pretended to.<sup>d</sup> But if there are other rules which demand that the interpretation be made against the person who is obliged, as in case of the following article, the obligation is extended according to the circumstances. And in general, when the engagement is sufficiently understood, it ought neither to be extended nor restrained, to the prejudice of one party in favor of the other.<sup>e</sup>

## XIV.

173. *7th Rule. Interpretation against him who ought to have explained his Meaning.* — If the obscurity, ambiguity, or other de-

<sup>r</sup> In the same manner as we interpret the several parts of a law. *L. 24, D. de legib.*; — *l. 134, § 1, D. de verb. oblig.*

<sup>a</sup> *L. 219, D. de verb. sign.*; — *l. 6, § 1, D. de contr. empt.*; — *l. 7, in f. D. de suppell. leg.*

<sup>b</sup> *L. 67, D. de reg. jur.*; — *l. 80, D. de verb. oblig.*

<sup>c</sup> *L. 47, D. de obl. et act.*; — *l. 38, § 18, D. de verb. oblig.*

<sup>d</sup> *L. 99, D. eod.*; — *l. 109, D. de verb. oblig.*

<sup>e</sup> *L. 3, D. de reb. cred.*

fect of expression, be an effect of the knavery or fault of him who ought to explain his intention, it is to be interpreted against him, because he ought to have explained distinctly what his meaning was. Thus, when a seller makes use of an equivocal expression concerning the qualities of the thing which he sells, his words are explained against him.<sup>a</sup>

## XV.

174. 8th Rule. *The alternative Obligation is in the Choice of him who is obliged.* — If one is obliged indeterminately to one or other of two things, he is at liberty to give that which he pleases, if the covenant contains nothing to the contrary.<sup>a</sup>

## XVI.

175. 9th Rule. *Obligations of Things whose Goodness and Value may reach to more or less.* — In the covenants, where one is obliged for things whose value may reach to more or less, according to the difference of their qualities, such as provisions,<sup>b</sup> some kinds of works,<sup>c</sup> or other things, the obligation is not extended to that which is best, and of the greatest price, but is moderated to that which is called good and merchantable.<sup>d</sup> And the debtor, for example, who owes wheat, discharges himself of his obligation, if he gives wheat that is good and vendible; because it is presumed that the contractors did not think of any other but that which is of common use. But if the covenant regulates that which is due, or if the intention of the contractors appears by the circumstances, we must hold to that.<sup>e</sup>

## XVII.

176. 10th Rule. *How the Price of Things is regulated.* — If in a covenant the parties omit to regulate the price of a thing,<sup>f</sup> it is to be estimated neither at the highest nor lowest price,

<sup>a</sup> L. 39, *D. de pact.*; — l. 21, *D. de contr. empt.*; — l. 33, *D. de contr. empt.*; — l. 172, *D. de reg. jur.*; — V. l. 69, § 5, *D. de evict.*; — l. 39, *D. de act. empt. et vend.* See the tenth article of the third section of *Hiring and Letting to Hire*; and the fourteenth article of the eleventh section of the *Contract of Sale*.

<sup>b</sup> L. 10, in fine, *D. de jur. dot.*; — l. 25, *D. de contr. empt.*; — v. l. 21, in fine, *D. de act. empt.*

<sup>c</sup> L. 75, § 1, *D. de verb. obl.*; — d. l. § 2; — l. 52, *D. mand.*

<sup>d</sup> L. 54, § 1, *D. de verb. oblig.*

<sup>e</sup> L. 19, § 4, *D. de acd. ed.*; — l. 18, *eod.*; — d. l. 18, § 1; — l. 16, § 1, *D. de op. lib.*

<sup>f</sup> L. 45, § 2, *D. de verb. obl.*; — V. l. 52, *D. mand.*

<sup>g</sup> L. 16, § ult. *D. de pign.*

but at the common rate,<sup>8</sup> without any regard to the particular circumstances of the affection which either the one or other of the contractors might have had for the thing that is to be estimated, or of their want of it.<sup>h</sup> But we ought only to consider what it is worth in reality;<sup>i</sup> what it would be worth in its common use to any person whatsoever; and what it might be reasonably sold for.<sup>1</sup>

## XVIII.

177. *11th Rule. Of the Time and Place of the Estimation.*—The estimation of things which have not been delivered at the time and place appointed, as of wine, corn, and other things of the like nature, is made according to the value they had at the time, and in the place where they ought to have been delivered.<sup>m</sup>

## XIX.

178. *12th Rule. Expressions which have no Sense.*—The expressions which can have no sense any manner of way are rejected, as if they had not been written.<sup>n</sup>

## XX.

179. *13th Rule. Faults in the Writing.*—The faults in the writing, which may be repaired by the sense clearly understood, do not hinder the effects which the covenant ought to have.<sup>o</sup>

## XXI.

180. *14th Rule. Covenants are limited to the Matters of which they treat.*—All the clauses of covenants have their sense limited to the matter of which they treat; and ought not to be extended to things which were never thought of.<sup>p</sup> Thus, a general acquittance, which has relation to a stated account of charge and discharge, does not annul obligations which are not accounted for.<sup>q</sup> Thus, a transaction is limited to the differences concerning which the parties treated; and does not extend to others which were not

<sup>8</sup> L. 3, § 5, *D. de jur. fisc.*; — l. 62, § 1, *D. ad leg. Falc.*; — l. 50, *D. de furt.*

<sup>h</sup> L. 63, *D. ad leg. Falc.*; — l. 33, *D. ad leg. Aquil.*

<sup>i</sup> L. 62, § 1, *D. ad leg. Falc.*

<sup>1</sup> L. 33, *D. ad leg. Aq.*; — l. 52, § 39, *D. de furt.*

<sup>m</sup> L. 4, *D. de cond. tritic.*; — l. 22, *D. de reb. cred.*

<sup>n</sup> The same as in testaments. L. 73, § 3, *D. de reg. jur.*

<sup>o</sup> L. 92, *D. de reg. jur.*

<sup>p</sup> L. 27, § 4, *D. de pact.*; — l. 9, *in fine, D. de trans.*

<sup>q</sup> L. 47, *in f. D. de pact.*

under treaty. For we ought not to presume either that a person engages himself, or discharges another of his engagement, unless his will is clearly explained, and rightly understood.<sup>a</sup>

## XXII.

181. *15th Rule. Interpretations of Judicial Covenants.* — If it happens that a covenant is made only in obedience to an order of court; as if a judge orders a plaintiff to make some abatement in order to receive what he demands, or that security be given for certain things; in these and the like cases, if the act or deed which contains the engagement that is enjoined by a sentence, or decree, happens to have any ambiguity or obscurity in it, it ought to be interpreted by the intention of the sentence, or decree, in execution of which it is made.<sup>a</sup>

## SECTION III.

OF ENGAGEMENTS WHICH FOLLOW NATURALLY FROM COVENANTS,  
ALTHOUGH THEY BE NOT PARTICULARLY MENTIONED THEREIN.

## ART. I.

182. *Three Sorts of Engagements in Covenants.* — Covenants oblige not only to what is expressed in them, but likewise to every thing which the nature of the covenant demands; and to all the consequences which equity, law, and custom give to the obligation which the parties have contracted.<sup>a</sup> So that we may distinguish three sorts of engagements in covenants. Those which are expressly mentioned; those which are natural consequences of the covenants; and those which are regulated by some law, or some custom. Thus, it is by natural equity that a partner is obliged to take care of the common affair which is in his hands; that he who borrows a thing to use it ought to preserve it carefully; that the seller ought to warrant that which he has sold; although the covenants make no express mention of these things.<sup>b</sup> Thus, it is in virtue of a law, that whoever purchases an estate for less than half

<sup>a</sup> L. 9, § 1, *D. de trans.*; — l. 5, *D. de trans.*; — l. 3, *C. cod.*; — d. l. 9, in *f. de trans.*

<sup>b</sup> L. 9, *D. de stip. præst.*; — l. 52, *D. de verb. obl.*

<sup>c</sup> L. 2, § ult. *D. de obl. et act.*; — l. 31, § 20, *D. de æd. ed.*; — l. 17, § 1, *D. de aqua et aquæ plu. arc.*

<sup>d</sup> L. 11, § 1, *D. de act. empt.*

the just value, is obliged either to restore it, or make up the price. Thus, in the lease of a house, some customs continue the lease beyond the term for a certain time, unless the contractors have derogated from it. And all these consequences of covenants are, as it were, tacit pacts, which are understood, and which make a part of the covenant. For the contractors consent to every thing that is essential to their engagements.<sup>a</sup>

## II.

183. *Reciprocal Performance of Covenants.*—In all covenants, the engagement of one of the parties being the foundation of the engagement of the other, the first effect of the covenant is, that every one of the contractors may oblige the other to execute his engagement, by performing what he is bound to do on his own part, according as one or other of the parties is obliged by the covenant. Whether it be that the articles of the covenant are to be performed on both sides at one and the same time; as if it is agreed on in a sale, that the price shall be paid at the time of the delivery of the goods; or whether it be that performance is to be made first by one of the parties, as if the seller is obliged to deliver the goods, and has given some respite of time for payment of the price, or by the other, as if the buyer be to pay the money down, before the goods are delivered.<sup>d</sup>

## III.

184. *Exceptions to the foregoing Rule.*—If when a covenant is not at all executed, or when it is done only by one of the parties, there happens a change, which ought to suspend its execution, or the performance of what remains to be executed, it is understood by the tacit will of the contractors, that the execution ought to be suspended until the obstacle is removed. Thus the buyer, who, after the sale, discovers that there is danger of an eviction, before he has paid the price, will not be bound to pay the price, till he is sufficiently secured against the eviction.<sup>e</sup>

<sup>a</sup> L. 4, D. in quib. caus. pign. vel hyp. t. c.; — l. 2, § 3, D. de eo quod cert. loc.; — l. 13, in f. D. commod.; — l. 3, D. de reb. cred.; — l. 9, D. de servit.

<sup>d</sup> L. 19, D. de verb. sign.; — l. 2, § ult. D. de obl. et act.; — l. ult. C. ad vell.; — l. 1, C. qu. dec. non est op.; — l. 5, C. de obl. et act.

<sup>e</sup> L. 18, § 1, D. de per. et com. r. v.; — v. l. 17, § 2, D. de doli mal. exc. See the eleventh article of the third section of the *Contract of Sale*.

## IV.

185. *Penalties of the Non-performance of Covenants.*— In all covenants, it is the second effect of the engagement, that he who fails in the performance of what he is bound to, or delays to do it, whether it be for want of ability or want of will, shall be bound to make good the damages of the other party, according to the nature of the covenant, the quality of the non-performance or delay, and the circumstances of the case.<sup>f</sup> And if there is ground to dissolve the covenant, it shall be dissolved, with a reservation of the penalties which ought to follow from it against him who shall have failed to perform his part of the engagement.<sup>g</sup>

## V.

186. *An Obligation without a Term.*— If it has been omitted in a covenant to express the term of payment, or delivery of any other thing promised, it is a consequence of the covenant, that, since the term is added only in favor of the person who is obliged, if no time is allowed him for performing what he ought to do or to give, he is bound to do it or to give it immediately, and without delay. Unless it happens that the performance of the covenant implies the necessity of a delay, as if the performance is to be made in another place than that where the parties entered into the covenant.<sup>h</sup>

## VI.

187. *The Place of Payment, or other Performance of Covenants.*— If, in a covenant which obliges one to deliver any movable thing, it has been omitted to express the place where the delivery ought to be made, the thing shall be delivered in the place where it shall happen to be at the time; unless it is by the knavery of the person who ought to deliver it, that it has been removed from the place where it ought to be; or that it appears to have been the intention of the contractors, that the thing should be delivered in another place.<sup>i</sup>

<sup>f</sup> L. 5, § 1, *D. de præsc. verb.*; — l. 29, § 2, *D. de æd. ed.* See concerning damages, the seventeenth and eighteenth articles of the second section of the *Contract of Sale*.

<sup>g</sup> L. 5, § 1; *D. de præsc. verb.*; — l. 60, *D. de æd. ed.*; — l. 6, *C. de pact. int. empt. et vend. comp.*; — l. 6, *C. de hæc. vel act.*; — l. 31, *D. de reb. cred.*

<sup>h</sup> L. 14, *D. de reg. jur.*; — l. 41, § 1, *D. de verb. obl.*; — § 2, *Inst. cod.*; — d. l. 41, § 1, in f.

<sup>i</sup> L. 12, § 1, *D. depos.*; — l. 38, *D. de jud.*; — v. ll. 10, 11, 12, *D. de rei vind.*; — l. 3, *D. de eo quod cert. loc.*

## VII.

188. *The Delay lasts till the last Moment of the Term is expired.* — He who has a term for paying, delivering, or doing any thing, is not in delay, nor can he be sued, till the last moment of the term is expired. For it cannot be said that he has not satisfied his obligation, till the delay is fully expired. Thus, he who is bound to make payment within a year, a month, or a day, has for his delay all the moments of the year, the month, or the day.<sup>1</sup>

## VIII.

189. *Of the Care which one ought to take of that which belongs to another, when the Charge of it is committed to him by some Covenant.* — It is a natural consequence of many covenants, that those who have the charge either of a thing or of an affair belonging to another person, or which belongs to them in common, are bound to take care of it; and they are answerable for their knavery, their faults, their negligences, but in a different manner,<sup>m</sup> according to the different causes for which the thing is committed to their charge, whether it be for their own interest alone, as he who borrows a thing of another to make use of it;<sup>n</sup> or for the bare interest of the owner, as the depositary;<sup>o</sup> or for their common interest, as in the case of a partner.<sup>p</sup> And they are obliged to more or less care and diligence, according to the rules which shall be explained in each kind of covenant: but if it be adjusted in the covenant what care he ought to take who is intrusted with the affair, or thing, of another person, or which is in common to them both, it is necessary to keep to that.<sup>q</sup>

## IX.

190. *Nobody is accountable for Accidents.* — Nobody is bound, in any kind of covenant, to answer for the losses and damages occasioned by accident, such as a thunderbolt, an inundation, a torrent, force, and other events of the like nature. And the loss of the thing which perishes, or which is damaged by chance, falls upon him who is the master of it, unless it has been otherwise.

<sup>1</sup> § 2, *Inst. de verb. obl.*; — l. 50, *D. de obl. et act.*; — l. 42, *D. de verb. obl.*

<sup>m</sup> L. 23, *D. de reg. jur.*; — l. 5, § 2, *D. commod.*

<sup>n</sup> D. l. 5, § 2r

<sup>o</sup> D. § 2.

<sup>p</sup> D. § 2.

<sup>q</sup> D. l. 23, *D. de reg. jur.*

agreed on,<sup>r</sup> or that the loss or damage may be imputed to some fault, for which one of the contractors is accountable; as if a thing which ought to have been delivered happens to perish, while he who ought to deliver it refuses to do it.<sup>s</sup>

## X.

191. *He who reaps the Profit ought to bear the Loss.*—As it often happens, after covenants are agreed on, that the same thing, or the same affair, is an occasion of gain or loss, according to the variety of accidents; it is always understood, that he who reaps the profit ought to bear the loss;<sup>t</sup> unless it be that the loss ought to be imputed to the fault of the other party. Thus, as the buyer, after the sale, has the advantage of the changes which make the thing better; he suffers likewise the loss of those that make it worse.<sup>u</sup> Unless the loss may be imputed to the seller; as if the thing perishes, or is diminished, whilst he is in delay to deliver it.<sup>v</sup>

## XI.

192. *The Estimation referred to some Persons.*—In the covenants in which an estimation is to be made, as of the price in a sale, of the value of a rent, of the quality of a work, of the shares of gain and loss which partners ought to have, and others of the like nature; if the contractors refer the matter to the arbitration of a third person, whether they name him or not; or even to the arbitration of one of the parties; it is the same thing as if they had referred it to the arbitration of persons of probity and skill in the matter. And whatever shall be awarded contrary to this rule will not be of any force; because the intention of those who make such references to other persons implies the condition, that what shall be regulated in the matter shall be reasonable; and their design is not to oblige themselves to what may be arbitrated beyond the bounds of reason and equity:<sup>y</sup> but if the person named either

<sup>r</sup> L. 23, D. de reg. jur. in f.; — l. 1, C. de commod.; — v. l. 39, D. mand. See the sixth article of the second section of the *Loan of Things to be restored in Specie*.

<sup>s</sup> L. 5, D. de reb. cred.; — v. l. 11, § 1, D. locat. cond.; — l. 11, D. de neg. gest.; — l. 1, § 4, D. de obl. et act.

<sup>t</sup> L. 10, D. de reg. jur.; — § 3, Inst. de empt. et vend.; — l. 13, § 1, D. commod.

<sup>u</sup> L. 1, C. de per. et com. r. v.

<sup>v</sup> L. 14, D. de per. et com.

<sup>y</sup> L. 76, et seq. D. pro socio; — l. 24, D. loc. — l. 30, D. de opt. lib. It is necessary here to observe the difference between this sort of arbitrators, and arbitrators named in a compromise, and what shall be said of them in the title of *Compromises*. See l. 76, D. pro socio.



could not or would not make the estimation, or died before he could make it, the covenant in that case would be null. For it contained the condition, that the estimation should be made by that person.\*

## XII.

193. *A Perfect Integrity is required in all Kinds of Covenants.*—There is no sort of covenant in which it is not understood that the one party is bound to deal honestly and fairly by the other, and to do whatever equity may demand;<sup>a</sup> as well in the manner of expressing himself in the covenant, as in the performance of what is covenanted, and of all the consequences of it.<sup>b</sup> And although in some covenants this honest and fair dealing has a larger, and in some a lesser extent, yet it ought to be sincere in all covenants; and each party is obliged to every thing that the same may require, according to the nature of the covenant and the consequences that it may have.<sup>c</sup> Thus, in a sale, this integrity forms a greater number of engagements, than in the loan of money. For the seller is obliged to deliver the thing sold;<sup>d</sup> to keep it till the time of delivery;<sup>e</sup> to warrant it;<sup>f</sup> to take it back again, if it has such faults as that the sale ought to be made void.<sup>g</sup> And the buyer has likewise his engagements; which shall be explained in their place. But in the loan of money, the borrower is bound only to restore the same sum,<sup>h</sup> with the interest, if he does not pay it at the term after demand.<sup>i</sup>

<sup>a</sup> L. 75, D. pro socio; — l. ult. C. de contr. empt.

<sup>b</sup> L. 4, C. de obl. et act.; — l. 31, D. de pos.

<sup>c</sup> L. 2, § ult. D. de obl. et act.

<sup>d</sup> L. 11, § 1, D. de act. empt. et vend.

<sup>e</sup> D. l. 11, § 1.

<sup>f</sup> L. 36, D. de act. empt. et vend.

<sup>g</sup> L. 39, § 2, D. de evict.

<sup>h</sup> L. 11, § 3, D. de act. empt. et vend.

<sup>i</sup> L. 2, D. de reb. cred.; — l. 1, § 2, D. de obl. et act.

<sup>1</sup> L. 3, § 1, D. de usur. This difference between a greater and lesser extent of integrity, according to the differences of covenants, is the foundation of the distinction that is made in the Roman law between contracts which are there called contracts *bonæ fidei*, and those which are said to be *stricti juris*; the meaning of which is, that some contracts are so to be interpreted by the rules of honesty and conscience, that they are supposed to include many things, although they be not expressly mentioned in the contract; and that in other contracts the very letter of the contract is to be closely adhered to. But by the law of nature, and by our customs, every contract is *bonæ fidei*; because honesty and integrity have and ought to have in all contracts the full extent that equity can demand. Ne propter nimiam subtilitatem verborum, latitudo voluntatis contrahentium impediatur. L. un. C. ut act. et ab hæc. et contr. hæc.; — v. l. 111, D. de verb. obl.

## XIII.

194. *Honesty required as to Third Persons.*—The honesty which is necessary in covenants is not confined to what concerns the contractors themselves; but they are bound likewise to deal honestly with respect to all those who may have an interest in what is transacted between them. Thus, for example, if a depositary discovers that the person who made the deposit has stolen the thing deposited, honesty obliges him to refuse to give it back to the thief who intrusted it with him, and to restore it to the person who appears to be the true owner.<sup>1</sup>

## XIV.

195. *In what Sense we ought to understand that it is lawful for one Party to cheat the other.*—The ways by which every one manages his own interest, at the time he contracts with another, and the resistance of one party to the pretensions of the other, within the bounds of that which is uncertain and arbitrary, and which must be regulated, have nothing in them contrary to honesty. And whereas it is said that it is lawful, for example, in sales, for one to overreach the other, this ought to be understood of the advantage which the one party takes of the other, in that extent which is uncertain and arbitrary; such as in the greatness or lowness of the price;<sup>m</sup> but this liberty ought not to be extended to any fraud.

## XV.

196. *Delays are arbitrary for the Performance of Covenants, according to the Condition of Things.*—In all covenants in which one of the contractors is obliged to do or give a thing, or to accomplish in any other manner that which is agreed on; and especially in those in which the non-performance is to be attended with a dissolution of the contract, or with some other penalty, it is equitable, and for the public interest, that the covenants be not immediately dissolved, nor the penalties incurred for every sort of non-performance indifferently. Thus, for example, if the buyer does not pay the price at the time appointed, the sale shall not be instantly annulled, even although it had been so agreed on; but a certain time is allowed to the buyer to pay the price before the

<sup>1</sup> L. 31, § 1, *D. depos.* See the end of the third section of *Deposit*.

<sup>m</sup> L. 16, § 4, *D. de min.*;—l. 10, *C. de resc. vend.*;—l. 22, § ult. *D. locat.*;—v l. 8, *C. de resc. vend.*

sale be made void. And in the other cases of backwardness, whether of payment, or delivery of any thing, the judge ought in prudence to grant such delays as may be reasonable, according to the circumstances.<sup>a</sup>

## SECTION IV.

OF THE SEVERAL SORTS OF PACTS WHICH MAY BE ADDED TO COVENANTS; AND PARTICULARLY OF CONDITIONS.

197. *Among the several sorts of pacts that may be added to all manner of covenants, some are of common use to all the kinds of covenants, such as conditions, clauses of nullity, and others; and there are some which are peculiar to some kinds of covenants, such as the power of redemption to the contract of sale. We shall only set down here such as are common to all sorts of covenants; and what are peculiar to some covenants shall be inserted in their proper places.*

### ART. I.

198. *An Indefinite Liberty for all Sorts of Pacts.* — Seeing covenants are arbitrary, and vary according to the wants of mankind; we may to all sorts of covenants, contracts, and treaties, add all manner of pacts, conditions, restrictions, reservations, general acquittances, and others, provided that they have nothing in them contrary to law and good manners.<sup>a</sup>

### II.

199. *We may add to ordinary Engagements, or take from them.* — We may likewise change the natural and ordinary engagements of covenants, and either augment or diminish them, or even derogate from them. Thus, in the contracts of sale, deposit, partnership, and others, the laws have regulated in what manner the one party is answerable to the other for his fault, or his negligence; but one may charge himself with more or less care and diligence,

<sup>a</sup> L. 23, in f. *D. de obl. et act.*; — l. 45, § 10, *D. de jur. fisc.*; — l. 135, § 2, *D. de verb. obl.*; — l. 24, § 4, *D. locat.* See the fifteenth, sixteenth, and eighteenth articles of the following section, and the tenth article of the second section of *Partnership*.

<sup>b</sup> V. sup. Sect. 2, art. 2; — l. 1, *D. de pact.*; — l. 23, *D. de reg. jur.*; — l. 1, § 6, *D. depos.*; — l. 27, § 4, *D. de pact.*

according as it is agreed on.<sup>b</sup> Thus the seller, although naturally bound to warrant what he has sold, may free himself from all other warranty besides that of his own act and deed.<sup>c</sup> And the equity of these arguments is grounded on the particular motives which the contractors have to enter into them. That seller, for instance, is discharged from warranty, because he sells the thing at a lower price.

### III.

200. *Exception of that, which would be against Honesty.*—The liberty of augmenting or diminishing engagements is always restrained to what may be done honestly, and without fraud or deceit. And deceit is always excluded from all manner of covenants.<sup>d</sup>

### IV.

201. *Every one may renounce his own Right.*—In all covenants, every one may renounce his own right, and that which is for his advantage;<sup>e</sup> provided that what he does be not contrary to equity, law, and good manners, nor to the interest of a third person.<sup>f</sup>

### V.

202. *Pactions are limited to their Subject-matter.*—The particular pactions which are added in contracts are limited to the matter which occasions them, and are not to be extended to that which the contractors had not in view.<sup>g</sup>

## OF CONDITIONS.

### VI.

203. *Definition of Conditions, their Use, and different Effects.*—It being usual in covenants for the parties to foresee accidents that may produce some change which they are willing to guard against, they therefore regulate what shall be done if those cases do happen. And this is what is done by the use of conditions.

<sup>b</sup> L. 23, D. de reg. jur.

<sup>c</sup> L. 11, § 18, D. de act. empt. et vend. See the fifth, sixth, and seventh articles of the tenth section of the *Contract of Sale*.

<sup>d</sup> L. 27, § 3, D. de pact.; — l. 1, § 7, D. dep.; — l. 23, D. de reg. jur.; — l. 69, D. de verb. sign.; — l. 7, § 7, D. de pact.

<sup>e</sup> L. 46, D. de pact.; — l. 29, C. eod.; — l. 41, D. de min.

<sup>f</sup> L. 74, D. de reg. jur.; — l. 27, § 4, D. de pact. See the third article of the second section. V. l. 4, § 4, D. si quis caut.; — v. l. 8, D. de trans.

<sup>g</sup> See the twenty-first article of the second section of this title. L. 27, § 4, D. de pact.

204. Conditions, therefore, are pactions which regulate that which the contractors have a mind should be done, if a case which they foresee should come to pass. Thus, if it is said that, in case a house that is sold be found to be subject to such a service, the sale shall be void, or the price lowered, this is a condition: for the parties foresee a case, and they guard against it. Thus, if a house is sold on condition that the purchaser shall not raise it higher, the seller foresees that the buyer may make this change, and he provides against it, that he may preserve the lights of another house different from that which he sells.

205. We have added this second example, to show that the burdens which contractors impose upon one another in covenants are of the same nature with conditions. For it is, properly speaking, a burden imposed upon the purchaser, not to have power to build his house higher; but this burden implies a condition, as if it had been said, that, in case the purchaser should offer to raise his house, the seller might hinder him. And it is for this reason, that we often make use of the word *condition*, and of the word *burden*, indifferently; and we say, on such a condition, or with such a burden. And we likewise use the word *conditions* in the plural number, to denote the different agreements in a treaty, because they all of them oblige in such a manner, that, if it happens that the parties fail in performing them, or act contrary to them, they are liable to the penalties of non-performance.

206. The events foreseen by conditions are of three sorts. Some of them depend on the act of the persons who treat together, as if it is said, In case that a partner engages himself in another partnership. Others are independent of the will of the contractors, such as casual events, as if it is said, In case there happens a frost, hail, or barrenness. And there are some which depend partly on the act of the contractors, and partly on chance, as if it is said, In case that such a merchandise arrives such a day.

207. Conditions are of three sorts, according to the different effects which they may have. One is of those which accomplish the covenants that are made to depend on them; as if it is said, that a sale shall take place, in case the goods be delivered on such a day. The second is of such as dissolve the covenants; as if it is said, that, if such a person arrive within such a time, the lease of a house shall be void. And the third sort is of those which neither accomplish nor dissolve the covenants; but which only

make some other changes in them; as if it is said, that, if a house which is let be given without the movables that were promised, the rent shall be lessened so much.

208. There are some conditions expressed, and there are others tacit, which are understood without being expressed. The express conditions are all those which are expressly mentioned; as when it is said, if such a thing be done, or not; if such a thing happen, or not. The tacit conditions are those which are implied in a covenant, without being expressed; as if it is said, in the sale of an estate, that the seller reserves to himself the fruits of that year; this reservation implies the condition, that there shall grow fruits, in the same manner as if had been said, that he reserved the fruits, in case there should be any.\*

## VII.

209. *Of the Condition on which depends the Accomplishment of a Covenant.*—In the covenants whose accomplishment depends on the event of a condition, all things remain in suspense, and in the same condition as if there never had been any covenant, until the condition happens. Thus, in a sale which is to be perfected by the event of a condition, the buyer has in the mean while only an expectation, without any right either to enjoy the thing, or to acquire it by prescription.<sup>b</sup> But the seller continues to be master of the thing sold, and the fruits of it belong to him.<sup>1</sup> And if the condition does not happen, the contract is void.<sup>1</sup>

## VIII.

210. *Effect of the Event of this Condition.*—The condition on which depends the accomplishment of a covenant being come to pass, it makes the covenant effectual, and produces the changes which ought to follow from it. Thus, a sale being perfected by the event of a condition, the buyer becomes instantly master of the thing; and this change has the other consequences which are the effects of the covenant.<sup>m</sup>

\* L. 78, D. de verb. obl.; — l. 1, § 3, D. de cond. et dem.

<sup>b</sup> L. 4, D. de in diem add.; — § 4, Inst. de verb. obl.; — l. 54, D. de verb. sign.

<sup>1</sup> L. 8, D. de per. et com. r. v.

<sup>1</sup> L. 37, D. de contr. empt.; — l. 8, D. de per. et com. r. v.

<sup>m</sup> L. 7, D. de contr. empt.; — l. 8, D. de per. et com. r. v. The event of the condition hath sometimes a retroactive effect. Thus, the mortgage stipulated in a conditional obligation will have its effect from the date of the obligation, whenever the condition shall come to pass. See the seventeenth article of the third section of *Mortgages*.

## IX.

211. *Of the Condition on which the Dissolution of a Covenant depends.*—In covenants which are already perfected, but which may be dissolved by the event of a condition, all things remain in the mean while in the same condition they were in by the covenant; and the effect of the condition is in suspense, until it happens. Thus, if it is said that a sale which is perfected shall be void, in case that within a certain time a third person give a greater price for the thing sold, the buyer until then remains master, he prescribes, he enjoys the fruits; and if the thing perishes, he bears the loss of it.<sup>n</sup>

## X.

212. *Effect of the Event of this Condition.*—The case of the condition which is to annul a covenant being come to pass, the covenant shall be void.<sup>o</sup> And this change shall have the effects which ought to follow from it, according to the rules which shall be explained in the sixth section, and in the rule that follows.

## XI.

213. *In what Manner the Consequences of Conditional Covenants are regulated.*—Whatever happens either before or after the event of the condition, it is regulated according to the state in which things are at the time. Thus, when a sale is perfected, and is to be annulled in case a certain condition happens, the buyer is in the mean while master of the thing; he prescribes, he enjoys the fruits of it; and if it happens to perish, he bears the loss: because the sale subsists still; and consequently the thing belongs to him, until the sale be annulled by the event of the condition.<sup>p</sup> And, on the contrary, when the accomplishment of a sale depends on a condition, if before the event of that condition the thing perishes, it is the seller that bears the loss, because he continues to be master of it, till the event of the condition accomplishes the sale.<sup>q</sup> And after that the condition is come to pass, all the events of gain or of loss belong to the person who at that time happens to be master of the thing, whether the condition accomplishes or whether it dissolves the covenant. Thus, it is

<sup>n</sup> L. 2, D. *de in diem add.*; — d. l. 2, § 1.

<sup>o</sup> L. 2, D. *de in diem add.*; — l. 3, D. *de contr. empt.*

<sup>p</sup> L. 2, § 1, D. *de in diem add.*

<sup>q</sup> L. 10, § 5, D. *de jur. dot.*

always the state in which things happen to be at the time when the condition comes to pass, and the effect which it ought to have, which regulate the consequence of conditional covenants.\*

## XII.

214. *Of Conditions which relate to the Present, or Past Time.* — Conditions which have no relation to the time to come, but only to the present or past time, have their effect immediately; and the covenant is at the same time either accomplished or annulled, according to the effect which it ought to have from the condition.† Thus, for example, if a merchandise is sold, on condition that the sale shall not take place unless the merchandise be actually arrived in such a port, the sale is either instantly accomplished, if the merchandise is arrived in port; or instantly void, if it is not arrived. And the covenant is not in suspense, although the persons who treat on such conditions are ignorant whether they are obliged, or not. But it is only the performance which is suspended, until they know whether the condition has happened, or not.‡

## XIII.

215. *Of Impossible Conditions.* — Conditions that are impossible annul the covenants to which they are added.‡

## XIV.

216. *The Effect of Conditions passes to Heirs.* — If the conditions do not happen till after the decease of the contractors, they have their effect with respect to their heirs and executors.‡

## XV.

217. *Conditions which do not depend on the Act of the Contractors have their Effect immediately.* — If the condition on which depends the accomplishment or dissolution of a contract, or the making any change in it, be independent of the act of the contractors, it hath its effect immediately when it happens, or as soon as it is known. Thus, for example, if it is agreed, that a sale of forage shall not take its effect, unless a regiment of horse arrives

\* L. 8, D. de peri. et com. r. v.

† L. 37, D. de reb. cred.; — v. l. 38 et 39, eod. — l. 100, D. de verb. oblig.

‡ L. 31, D. de obl. et act.

§ 24, Inst. de inut. stip.; — l. 8, D. de per. et com. r. v.



within such a time; it shall have its effect so soon as the regiment arrives; or it shall remain null, if the regiment does not arrive. Thus, when an estate is sold on condition that, if it be found subject to a certain charge, the sale shall be dissolved, it will depend on the buyer to break the sale, if the estate appears to be subject to that charge; \* unless it be such a one as is in the seller's power to free the estate of, and that the circumstances make it reasonable to allow him a time for doing it.

## XVI.

218. *Conditions which depend on the Act of the Contractors may suffer a Delay.* — If the condition depends either wholly, or in part, on the act of one of the contractors, and he has not satisfied it within the time, it is understood that, in the cases where it would be equitable to grant a delay, it ought to be granted according to the circumstances; as when the delay has occasioned no damage, or, if there is any, when it may be repaired. Thus, when an estate is farmed out, or a house let, on condition that the proprietor shall make some repairs within a certain time, the lease shall not be immediately void, although the repairs be not finished precisely within the time. But prudence will direct the judge to grant a delay according to the circumstances; either without damages, if the tenant has suffered no prejudice by the delay, or with reparation of the damage which the delay may have occasioned.

## XVII.

219. *An Exception.* — If a delay for performing a condition could not be granted, without destroying the very essence of the covenant, or without causing a considerable damage, the condition shall have its effect without delay, whether it depend on the act of one of the contractors, or be altogether independent of it. Thus, for example, if a sale of goods be made on condition that the seller shall deliver them on a certain day, for an embarkation, or for a fair, and that the buyer shall pay the price of the goods in ready money; it will depend on the buyer to annul the sale, if the seller does not deliver the goods on the day appointed; and it

\* § 4, *Inst. de verb. obl.* See, on this and the following article, the sixteenth article of the fifteenth section, and the fourteenth article of the sixth section.

† L. 23, *D. de obl. et act.*; — l. 21, *D. de jud.* See the next article, and the fifteenth article of the third section.

will likewise depend on the seller to break the contract, if the buyer does not pay in ready money. Thus, in all the cases, it is by the circumstances that we must judge whether there be room for granting a delay for performing a condition, or other engagement.\*

## XVIII.

220. *Of the Party who hinders the Accomplishment of the Condition.* — If the event or fulfilling of a condition be hindered by the party whose interest it is that it do not happen, whether it depend on his act or not, the condition with respect to him shall be held as fulfilled. And he shall be obliged to what he was bound to do, to give, or suffer, in case the condition happened.\*

## OF CLAUSES OF NULLITY, AND PENAL CLAUSES.

221. Clauses of nullity are those by which it is agreed that the covenant shall be null in a certain case. As if it is said, that a transaction shall be void, if such a thing be not done, or given, within such a time.

Penal clauses are those which add a penalty for default of performance of that which is agreed on. As is in general the penalty of damages, and in particular the penalty of a certain sum.

## XIX.

222. *The Effect of Clauses of Nullity and Penal Clauses.* — Clauses of nullity and penal clauses are not always executed to the rigor; and covenants are not dissolved, nor penalties incurred, in the very moment which the contract bears; even although it should be agreed on that the contract should be void, by the bare deed, and without any ministerial act of justice. But these sorts of clauses have their effect regulated by the discretion of the judge,\* according to the nature of the covenants, and the circumstances, pursuant to the foregoing rules.

## XX.

223. *It does not depend on him who fails in performing what he promised, to annul the Covenant by his Non-performance.* — If it is

\* See the fifteenth article of the third section.

\* L. 161, D. de reg. jur.

\* L. 135, § 2, D. de verb. obl. See the preceding rules, and the tenth article of the second section of Partnership.

said that a contract shall be made void, in case one of the contractors fail to perform on his part any one of the engagements he is bound to; the clause of nullity shall not have this effect, to make it depend on him to annul the contract by not performing what he has promised; but it will depend on the other party, either to force him to make performance, or to have the contract declared void, and such damages allowed him as shall be due. Thus, when it is said that a sale, a transaction, or other contract, shall be annulled upon failure of payment, it will not depend on him who is bound to pay, to annul the covenant by not making payment.<sup>b</sup>

## XXI.

224. *Covenants concerning an Uncertain Event.*—In covenants where persons treat of a right, or other thing which depends on some certain event, and from which there may accrue either profit or loss, according to the difference of events that may happen; it is free for the parties to treat in such a manner, that the one, for example, renounce all profit, and free himself from all loss; or that he take a certain sum in lieu of all that he could expect of profit; or that he charge himself with a certain loss for all the losses which he had to fear. Thus, a partner who is desirous to withdraw from the partnership may adjust with his copartners what present and certain profit he shall have, or what loss he shall bear, whatever accident fall out. Thus, an heir may treat with his coheirs to give up all his right in the inheritance, for a certain sum, and oblige them to indemnify him from all charges. And these kinds of covenants have their justice founded upon this, that one party prefers a certainty, whether of profit or loss, to an uncertain expectation of events; and the other party, on the contrary, finds it his advantage to hope for a better condition. Thus, there is made up between them a sort of equality in their bargains, which renders their agreement just.<sup>c</sup>

<sup>b</sup> *L. 2, D. de leg. commiss.*

<sup>c</sup> *V. l. 1, D. de trans. in verbo, de re dubia*; — *l. 12, C. cod.*; — *l. 17, C. de usur. in verbo, propter incertum*; — *v. l. 11, C. de trans.*; — *l. 2, § 9, de her. vel act. vend.*; — *l. 1, C. de exict.* It is upon the rule explained in this article, that the validity of transactions is founded, which are authorized notwithstanding the damage that may happen to one of the parties; because these damages are balanced by the advantage which the transactors find in ridding themselves of a troublesome lawsuit, and settling the quiet of their families.

We make use, likewise, of this rule, among other considerations, to justify our practice

## SECTION V.

## OF COVENANTS WHICH ARE NULL IN THEIR ORIGIN.

## ART. I.

225. *Definition of Covenants that are Null.*—Covenants that are null are those which, for want of some essential character, have not the nature of a covenant. As if one of the contractors was under any infirmity of mind or body, which rendered him incapable of knowing what engagement he made; <sup>a</sup> if one had sold a thing belonging to the public, a thing set apart for a sacred use, or any other thing that could not be bought or sold; or if the thing sold did already belong to the buyer.<sup>b</sup>

## II.

226. *Covenants Null, although the Nullity be not yet known.*—The covenants which are null in their origin are in effect such, whether the nullity can be immediately discovered, or whether the covenant appears to subsist, and to have some effect. Thus, when a madman sells his estate, the sale is immediately null from the beginning, although the purchaser be in possession of the estate, and enjoy the fruits of it, and although at the time of the sale this condition of the seller was not known. And it is the same thing, if one of the contractors has been compelled by force.<sup>c</sup>

## III.

227. *Causes of the Nullities of Covenants.*—Covenants are null, either because of the incapacity of the persons, as in the

in admitting the renunciations of daughters in contracts of marriage, contrary to the tenor of the Roman law. *V. l. 3, C. de collat.*

We must take heed in the use of this rule concerning treaties about uncertain events, not to extend it to cases where the consequences would be repugnant to law or good manners. As, for instance, if two presumptive heirs should treat together concerning the future inheritance of the person to whom they are to succeed as heirs. For this agreement would be unlawful, unless it were made with the express consent and approbation of the person concerning whose inheritance they treat, as shall be explained in its proper place. *V. l. 30, C. de pact.*

<sup>a</sup> See the title of the *Vices of Covenants.*

<sup>b</sup> § 8, *Inst. de inst. stip.*

<sup>c</sup> § 2, *cod.* See the first article of the sixth section.

<sup>d</sup> § 2, *Inst. de inst. stip.*; — *l. 1, C. de resc. vend.*

example of the preceding article; or because of some vice in the covenant, as if it is contrary to good manners;<sup>d</sup> or because of some other defect, as if it is not to be accomplished but by the event of a condition which is not come to pass;<sup>e</sup> or for other causes.<sup>f</sup>

## IV.

228. *Incapacity of Persons.* — Persons may be incapable of contracting, either by nature, or by some law. Thus, by nature, madmen,<sup>g</sup> and such persons as, because of some infirmity, are not able to express themselves,<sup>h</sup> are naturally incapable of all sorts of covenants. Thus, by the prohibition of the law, prodigals who are interdicted are incapable of making covenants to their prejudice.<sup>i</sup>

## V.

229. *Different Incapacities of Persons.* — The incapacities of persons are different, and have different effects. Some persons are incapable of all contracts; such as madmen, and those who cannot express themselves: others are only incapable of such covenants as are to their prejudice; such as minors and prodigals. And married women cannot contract any obligation whatsoever in some provinces, unless they are authorized by their husbands.<sup>j</sup>

## VI.

230. *Two Sorts of Nullities, either by Nature, or by some Law.* — The nullities of covenants are either natural, or depending on the disposition of some law. Thus, the covenants which are contrary to good manners, such as a treaty about the inheritance of a person who is alive,<sup>k</sup> and those which are impossible, are natu-

<sup>d</sup> § 24, *Inst. de inut. stip.* See the third article of the first section.

<sup>e</sup> L. 37, *D. de cont. empt.*; — l. 8, *D. de peric. et comm. r. v.*

<sup>f</sup> See the first article, and those which follow.

<sup>g</sup> § 8, *Inst. de inut. stip.*

<sup>h</sup> V. § 7, *cod.*

<sup>i</sup> L. 1, *D. de cur. fur.*; — l. 6, *D. de verb. obl.* There are other causes of incapacity; such as minority, civil death, and others. See the title of *Persons*.

<sup>j</sup> This follows from the foregoing articles. See, as to what is said here concerning married women, what has been observed on the first article of the first section of *Persons*. And in the preamble to the fourth section of the title of *Dowries*.

<sup>k</sup> L. 4, *C. de inut. stip.*; — r. l. 30, *C. de pact.*; — and the remark on the twentieth article of the fourth section.

rally vicious and null.<sup>a</sup> Thus, it is by a law that the sale of an entailed estate is unlawful and void.<sup>o</sup>

## VII.

231. *Covenants which are Null on one Part, and not on the other.* — There are covenants which may be declared null on the part of one of the contractors, and which subsist, and oblige irrevocably, on the part of the other. Thus, the contract between one that is of full age, and one under age, may be annulled with respect to him who is under age, if it is not to his advantage; and it subsists with respect to him that is of age, if the minor does not demand to be relieved.<sup>p</sup> And this inequality of the condition of the contractors has nothing in it that is unjust. For he that was of age knew, or ought to have known, the condition of him with whom he treated.<sup>q</sup>

## VIII.

232. *Covenants that are Null which may be validated.* — Covenants which were liable to be annulled by reason of the incapacity of the persons, become valid afterwards, if, when the incapacity ceases, the persons ratify or approve the covenant. Thus, when a minor, being come to age, ratifies or executes the contract which he had made in his minority, this contract becomes irrevocable, as if he had made it after he was of age.<sup>r</sup>

## IX.

233. *A Natural Obligation.* — Persons who are not by nature incapable of contracting, and who are only incapacitated by the prohibition of some law, do nevertheless tie themselves by their covenant to a natural obligation, which, according to the circumstances, may have this effect; that although they cannot be compelled by law to make good what they have promised, yet, if they do perform their engagement, they cannot afterwards be relieved.<sup>s</sup> Thus, for example, by the Roman law, a son who is still in the

<sup>a</sup> L. 185, D. de reg. jur.; — v. l. 7, C. de reb. al. n. al.

<sup>o</sup> L. 7, C. de reb. al. non al.

<sup>p</sup> L. 13, § 29, D. de act. empt. et vend.

<sup>q</sup> L. 19, D. de reg. jur.

<sup>r</sup> L. 8, § 2, D. de auth. et cons. tut. et cur.; — l. 2, C. si maj. fact. rat. hab.; — l. 3, § D. de min.

<sup>s</sup> L. 10, D. de obl. et act.; — l. 16, § 4, D. de fidejuss.; — l. 1, § 17, D. ad leg. Falc.; — l. 94, § 3, D. de sol.; — v. l. 10, D. de verb. signif.; — et l. 84, § 1, D. de reg. jur.

power of his father, although of age, cannot oblige himself by borrowing money; but if he pays what he has borrowed, he cannot afterwards recover it.<sup>1</sup> Thus, in the provinces where a married woman cannot bind herself, not even with the consent of her husband, if after the husband's death she pays what she had promised, she cannot plead the nullity of her engagement for recovering what she has paid.

## X.

234. *Error and Force annul Covenants.*—The covenants in which the persons, even those who are capable of contracting, did not know what was necessary to be known in order to form their engagement, or had not the liberty of consenting to it, are null. Thus, the covenants in which the contractors mistake one another's meaning, the one meaning to treat of one thing, and the other of another, are null, through the want of knowledge, and of their consent to one and the same thing.<sup>2</sup> Thus, covenants in which the liberty of the contractors is restrained by some violence are also null.<sup>3</sup>

## XI.

235. *Covenants about Things which cannot be bought or sold are Null.*—Covenants in which people treat about things which cannot be bought or sold, such as things set apart to a holy use, things belonging to the public, are null.<sup>4</sup>

## XII.

236. *A Covenant annulled by the Change of the Thing sold.*—If in a covenant the one party is bound to give a thing to the other, and before it be delivered the thing ceases to be a vendible commodity, without the act of the person who was bound to deliver it, the covenant will be annulled. Thus, the sale of an estate will be without effect, and will become null, if the estate is destined for some public work, without the act of the seller.<sup>5</sup>

<sup>1</sup> L. 9, in f. et l. 10, D. de senat. Maced.

<sup>2</sup> § 22, Inst. de inut. stip.; — l. 57, D. de obl. et act.; — l. 116, § 2, D. de reg. jur.; — v. l. 137, § 1, D. de verb. obl.; — l. 83, § 1, D. de verb. obl.; — l. 9, D. de contr. empt.

<sup>3</sup> L. 1, C. de resc. vend.; — d. l. 116, D. de reg. jur. See the title of the *Vices of Covenants*.

<sup>4</sup> L. 83, § 5, D. de verb. obl.; — § 2, Inst. de inut. stip.

<sup>5</sup> § 2, Inst. de inut. stip.; — l. 83, § 5, D. de verb. obl.

## XIII.

237. *Obligations without a Cause are Null.*—In covenants where-in any one is obliged without a cause, the obligation is null.<sup>a</sup> And it is the same thing, if the cause happens to cease.<sup>b</sup> But it is by the circumstances that we must judge whether the obligation hath its cause or not.

## XIV.

238. *The Effect of Covenants that are Null through the Fault of one of the Contractors.*—The covenants which happen to be null through some cause for which one of the contractors ought to be responsible, as if he has alienated a thing set apart to a holy use, or which belongs to the public, although they are null, yet they have this effect, to oblige the party who is in fault to make good the damages which he has occasioned to the other.<sup>c</sup>

## XV.

239. *The Consequences of Covenants annulled.*—If a covenant, although null, has had some consequence, or some effect, and is declared to be void, the contractors are restored to the condition which they would have been in, if there had been no covenant at all, in so far as the circumstances will allow, and with the restitutions that may be due from him who is liable to make them.<sup>d</sup>

## XVI.

240. *The Ministry of Justice for annulling Covenants.*—Although a covenant proves to be null, yet he who complains of it cannot restore himself to his own right, unless the other party consent to it. But he must have recourse to the authority of justice, whether it be to get the nullity declared by a sentence, and himself reinstated in his right, or to get the sentence of the court put in execution, in case it should meet with opposition.<sup>e</sup> For when it is necessary to make use of force, the public justice of a country suffers none but what she herself employs.

<sup>a</sup> See the fifth article of the first section.

<sup>b</sup> *L. 4, D. de condit. sine caus.*

<sup>c</sup> *§ ult. Inst. de emptione et venditione; — v. l. 3, C. de reb. alien. non alien.*

<sup>d</sup> *L. 7, § 1, D. de in int. restit.*

<sup>e</sup> *L. 13, D. quod met. caus.; — l. 1, C. de resc. vend.; — v. l. 9, C. sol. mat.; — v. l. 1, D. uti possid.* See the fourteenth article of the following section, and the second section of the *Vices of Covenants*.



## XVII.

241. *Covenants which are Null are useless to Third Persons, as well as to the Contractors themselves.*— If the covenants by which any right accrues to third persons prove to be null, they have no more effect with respect to those persons, than with respect to the contractors. Thus, the creditor has no mortgage on the estate which his debtor had acquired by a contract that was null.<sup>f</sup>

## SECTION VI.

OF THE DISSOLUTION OF COVENANTS WHICH WERE NOT NULL.

## ART. I.

242. *Difference between Covenants that are Null, and those that are dissolved.*— There is this difference between the nullity and dissolution of covenants, that the nullity makes it never to have been a real covenant, but only the appearance of one;<sup>a</sup> whereas the dissolution annuls a covenant which was in force.<sup>b</sup>

## II.

243. *Divers Cases which dissolve Covenants.*— Covenants which were valid may be dissolved, either by consent of the parties who change their minds;<sup>c</sup> or by the effect of some paction, which has been added to the covenant itself, such as a power of redemption,<sup>d</sup> a clause of nullity;<sup>e</sup> or by the event of a condition;<sup>f</sup> or by a restitution;<sup>g</sup> or by a rescission of the contract,<sup>h</sup> on account of some fraud, or other damages, such as the lowness of the price in a sale, or for other causes, as will appear in the following articles.

## III.

244. *The latter Covenants derogate from the first.*— The latter covenants which annul the former, or which change them, or dero-

<sup>f</sup> This rule is a consequence and a natural and necessary effect of the nullity.

<sup>a</sup> § 2, *Inst. de inut. stip.*

<sup>b</sup> *L. 2, C. de cond. ob caus. dat.*

<sup>c</sup> *L. 35, D. de reg. jur.*; — § ult. *Inst. quib. mod. toll. obl.*

<sup>d</sup> *V. l. 2, C. de pact. int. empt. et vend. c.*; — l. 7, *eod.*

<sup>e</sup> See the fifteenth article of the third section, and the eighteenth article of the fourth section.

<sup>f</sup> *L. 2, D. de in diem add.*

<sup>g</sup> *Tit. de in int. rest.*

<sup>h</sup> *Tit. de dolo, l. 2, C. de resc. vend.*

gate from them, have the effect which the contractors intend they should have, whether it be to annul or to alter what they had agreed upon; and they put the contractors in the condition in which they have a mind to put themselves by these changes, in so far as the circumstances will allow.<sup>1</sup>

## IV.

245. *New Covenants cannot prejudice the Rights which Third Persons have acquired by former Covenants.*—The changes which the contractors make in their former covenants by those of a later date are noways prejudicial to the rights which third persons had acquired by the first covenants. Thus, a sale which was already perfected, and executed in all its parts, being dissolved only by the bare will of the seller and buyer, the buyer's creditor retains his right of mortgage on the estate, which returns to the seller, by the bare voluntary dissolution of the contract of sale.<sup>1</sup> But if the covenant was dissolved by the effect of a clause in the contract, such as the event of a condition, or a power of redemption in a sale, this mortgage would vanish, and the contractors would enter again to their rights, even by the effect of their covenant.

## V.

246. *A Covenant dissolved by the Event of a Condition.*—Covenants which are accomplished but upon condition that, if such a case happens, they shall be void, continue in force till the condition happens, and then they are dissolved, pursuant to the fourteenth and fifteenth articles of the fourth section.<sup>m</sup>

## VI.

247. *Effect of Clauses of Nullity.*—If it is said in a covenant, that it shall be void in case one of the contractors fails to perform some engagement, the non-performance does not dissolve and annul the covenant, but in conformity to the rules explained in the eighteenth and nineteenth articles of the fourth section.<sup>n</sup>

<sup>1</sup> L. 12, C. de pact.

<sup>1</sup> L. 63, D. de jur. dot.;—l. 9, D. de lib. caus.;—l. 10, D. de jurejur. See the fourteenth and fifteenth articles of the twelfth section of the *Contract of Sale*, and the remarks made thereon.

<sup>m</sup> See the fourteenth and fifteenth articles of the fourth section, and the fourteenth article of this

<sup>n</sup> See the eighteenth and nineteenth articles of the fourth section, and the fourteenth article of this.

## VII.

248. *Covenants annulled by Agreement.* — If a covenant leaves a liberty to one of the contractors to recede from his bargain within a certain time, or if there is a power of redemption, or other clauses which may annul the covenant some other way, the putting these clauses in execution dissolves and annuls the covenant, according to the agreement of the contractors.<sup>o</sup>

## VIII.

249. *Covenants repealed because of Fraud.* — Covenants in which one of the contractors is overreached, and cheated by the fraud of the other, or by any other unfair way, are dissolved or annulled when the injured party complains of it, and proves the fact.<sup>p</sup>

## IX.

250. *Damage without Fraud, which is called Dolus re ipsa.* — *Inadequacy of Price.* — There are some covenants in which the bare damage, although without fraud, is sufficient to annul the covenant. Thus, for example, the partition of an inheritance among coheirs is annulled by reason of too great an inequality;<sup>q</sup> and a sale, on account of the lowness of the price,<sup>r</sup> or defect of the thing sold;<sup>s</sup> according to the rules, which shall be explained in their proper places.

## X.

251. *Events which dissolve Covenants.* — Covenants are sometimes dissolved by the bare effect of some event. Thus, for instance, in the lease of a house, if the neighbour darkens the lights of it; if the landlord does not repair what is ruinous;<sup>t</sup> if the house is to be pulled down for some public work;<sup>u</sup> the tenant in all these cases gets the lease to be declared void. Thus, a sale is dissolved by an eviction.<sup>x</sup> And it is likewise so, with respect to

<sup>o</sup> L. 31, § 22, *D. de ced. ed.*; — l. 3, *D. de contr. empt.*; — l. 2, § 5, *D. pro empt.*; — l. 2, et 7, *C. de pact. int. empt. et vend. c.* See the sixteenth article of the fifth section, and the last article of this section.

<sup>p</sup> *Toto tit. de dolo.* See the tenth article of the foregoing section, and the third section of the *Vices of Covenants*.

<sup>q</sup> L. 3, *C. comm. utr. jud.*; — l. 36, *D. de verb. obl.* See the fourth article of the third section of the *Vices of Covenants*.

<sup>r</sup> L. 2, *C. de resc. vend.*

<sup>s</sup> *Tot. tit. de edil. ed.*

<sup>t</sup> L. 25, § 2; *D. locat. cond.*

<sup>u</sup> L. 9, l. 14, et alii, *C. de op. publ.*

<sup>x</sup> *V. toto tit. de evict.*

the purchaser, by the right of redemption, which belongs to the next lineal heir, who comes in place of the purchaser. And many other events annul covenants, in different ways, according to the condition in which they put things.

## XI.

252. *Covenants dissolved for Non-performance.*—The non-performance of covenants on the part of one of the contractors may give occasion to their being annulled; whether it be through want of ability, or of will, in the party to perform his engagement, although there be in the contract no clause of nullity; as if the seller does not deliver the thing sold. And in these cases, the covenant is dissolved, either immediately, if there is ground for it, or after a reasonable delay, and with such damages as the non-performance may have occasioned.<sup>7</sup>

## XII.

253. *The Effects and Consequences of the Dissolution of Covenants.*—In all the cases where covenants are dissolved, if it is by the will of the contractors, they are mutually restored to the condition in which they have a mind to be by common consent. And if the covenant is repealed in a judicial way, the contractors are put into the condition which ought to follow upon the dissolution of the contract; and they are condemned to such restitutions, damages, and other consequences as the covenant ought to have, according to the circumstances, and with a due regard to the different causes of the dissolution; which depends on the prudence of the judge,<sup>8</sup> according to the foregoing rules, and the others which shall be explained under the title of *Rescission of Contracts*, and *Restitution of Things to their First Estate*.

## XIII.

254. *The Accessory Covenants are dissolved with the Principal.*—The principal covenants being annulled, those which are consequences and accessories to them are so likewise.<sup>9</sup>

<sup>7</sup> This rule is a consequence of the preceding rules. *L. 1, D. de act. empt. et vend.*; — *l. 4, C. eod.* See the following article, the fourteenth and fifteenth articles of the fifth section, and the seventeenth and eighteenth articles of the second section of the *Contract of Sale*.

<sup>8</sup> *L. 1, § 2, D. de min.*; — *l. 135, § 2, D. de verb. obl.*; — *l. 10, D. de rei vind.*; — *l. 68, eod.*  
<sup>9</sup> *L. 1, C. de cond. ob caus. dat.*

## XIV.

255. *The Authority of Justice in dissolving Covenants, and executing what is decreed.* — When a covenant is not dissolved by common consent, the party who complains cannot molest the other; but he ought to have recourse to justice, to get the covenant declared void, and the sentence of the judge put in execution.<sup>b</sup>

## TITLE II.

## OF THE CONTRACT OF SALE.

256. *Of the Origin and Use of the Contract of Sale.* — The necessity of having the property of the greatest part of things which we stand in need of, and especially of those which we cannot use without consuming or wasting them, and consequently without being masters of them, hath been the origin of the ways of acquiring things, and of transferring the property of them from one person to another.

257. The first commerce for this use was that of giving one thing for another. And this way of traffic is called *exchange*;\* in which, to have a thing which we stand in need of, we give another, which is useless, or less necessary to us. But because exchange, or bartering of commodities, seldom or never suits with the circumstances of all parties, either because the contractors have not on both sides wherewithal to accommodate one another; or because it is troublesome to make the estimations, and to adjust the things in a due equality, people have invented the use of public coin, which, having its value regulated and known, makes the price of every thing. And thus, instead of two estimations, which it was so difficult to make equal, there is no occasion now to estimate any more than one thing on one side; and on the other side there is the just price of the thing estimated by the public coin. And it is this commerce of all things for money, which we call *sale*; which is composed partly of the natural use of giving one thing for another, and of the invention of public coin, which makes the value of all things that are capable of being estimated.

<sup>b</sup> L. 68, *D. de rei vind.*; — L. 9, *C. sol. matr.* See the sixteenth article of the fifth section.

<sup>a</sup> L. 1, *D. de contr. empt.*

## SECTION I.

OF THE NATURE OF THE CONTRACT OF SALE, AND IN WHAT  
 MANNER IT IS PERFECTED.

## ART. I.

258. *Definition of Sale.*—The contract of sale is a covenant by which one gives a thing for a price in current money; and the other gives the price to have the thing.<sup>a</sup>

## II.

259. *The Sale is perfected by the bare Consent.*—The sale is perfected by the bare consent of the parties, although the thing sold be not as yet delivered, nor the price paid.<sup>b</sup>

## III.

260. *How the Consent is given.*—The consent which makes the sale is given either in presence of the parties, or in their absence; or in writing, or by word of mouth; or under the hand of the parties, or before a public notary: pursuant to the rules explained in the title of *Covenants*.<sup>c</sup> And after the sale is thus perfected, it is not any longer in the power either of the seller or buyer to revoke his consent; although it were immediately after the contract is ended; unless both parties should agree jointly to dissolve it.<sup>d</sup>

## IV.

261. *Who may sell and buy, and what Things may be sold.*—All sorts of persons may buy and sell, unless they are under some incapacity, or that the thing sold is not vendible, or unless there be some other vice in the sale; according to the rules which shall be explained in the eighth section.<sup>e</sup>

<sup>a</sup> L. 5, § 1, *D. de præsc. verb.*; — l. 2, § 1, *D. de contr. empt.*; — § 2, *Inst. de empt. et vend.*; — l. 1, *D. de contr. empt.*

<sup>b</sup> See the eighth article of the first section of the title of *Covenants*; — *Inst. de obl. ex consensu*; — l. 1, in *f. D. de contr. empt.*; — *Inst. de empt. et vend.* See the tenth article of the second section concerning the manner in which it is necessary to understand that the bare consent perfects the contract of sale.

<sup>c</sup> See art. 10, 11, 12, 13, 14, 15, and 16, of the second section of *Covenants*.

<sup>d</sup> L. 13, *C. de contr. empt.* See the fourteenth and fifteenth articles of the twelfth section.

<sup>e</sup> See the second article of the second section of *Covenants*.

## V.

262. *Three Sorts of Engagements in the Contract of Sale.* — The contract of sale, as all other contracts, forms three sorts of engagements. The first is of those which are expressed in the contract; the second, of those which are the natural consequences of the sale, although the contract makes no mention of them; and the third is of such engagements as the laws, customs, and usage of the country have established.<sup>f</sup>

## VI.

263. *The First Sort is of the Engagements that are expressed.* — The first of these three sorts of engagements reaches to all the particular covenants, and to all the different pacts, which may be added to the contract of sale; such as conditions, clauses of nullity in default of payment, the right of redemption, and others of the like nature, which shall be explained in the sixth section; and these covenants make a part of the contract, and are in the place of laws.<sup>g</sup>

## VII.

264. *The Second Sort is of the Engagements which arise from the Nature of the Contract.* — The second sort of engagements which are the natural consequences of the contract of sale, comprehends those under which the seller may be to the buyer, and the buyer to the seller, although the contract make no mention of them. These engagements oblige the parties in the same manner as the contract itself, of which they are consequences.<sup>h</sup> And they shall be explained in the two sections which follow.

## VIII.

265. *The Third Sort is of the Engagements regulated by the Laws, Custom, and Usage of the Country.* — The third sort of engagements consists of those which are established by particular laws, by the practice and custom of the country. Thus, custom has

<sup>f</sup> See the first article of the third section of *Covenants*. L. 11, § 1, *D. de act. empt. et vend.*; — l. 2, in f. *D. de oblig. et act.*; — § ult. *Inst. de obl. ex cons.*; — l. 31, § 20, *D. de ord. ed.*; — v. l. 8, et l. 19, *C. de locato et cond.*

<sup>g</sup> See the first article of the fourth section of *Covenants*, and the sixth section of this title. L. 23, *D. de reg. jur.*; — l. 1, § 6, *D. dep.*

<sup>h</sup> L. 2, in f. *D. de oblig. et act.* See the two following sections.

regulated, in the sale of horses, the defects which are sufficient to annul the sale.<sup>1</sup>

## SECTION II.

OF THE ENGAGEMENTS WHICH THE SELLER IS UNDER TO THE BUYER.

### ART. I.

266. *The First Engagement of the Seller is to deliver the Thing sold.* — People buy things for no other end but to have them in their own power, and to possess them. Thus, the first engagement which the seller is under is to deliver the thing sold, although the contract make no mention of it.<sup>a</sup> And the rules of this engagement shall be explained in the fifth article, and those that follow.

### II.

267. *The Second Engagement of the Seller is to take Care of the Thing sold till the Time of Delivery.* — It is a consequence of this first engagement of the delivery, and therefore is reckoned as a second engagement, that until the time of the delivery the seller is obliged to keep and to take care of the thing sold,<sup>b</sup> pursuant to the rules which shall be explained in the twenty-fourth article, and those that follow.

### III.

268. *The Third Engagement is that of Warranty.* — This is another consequence of the delivery, and makes a third engagement, that the seller ought to warrant, that is, secure the buyer in the peaceable possession of the thing sold. And this obliges the seller to put a stop to the pretensions of every one that claims, either a right of property in the thing sold, or any other right which might disturb the buyer in the possession and enjoyment of the thing he has bought. For it is the right to possess and to enjoy that he has bought.<sup>c</sup> I shall explain the rules of this engagement in the tenth section.

<sup>1</sup> L. 8, C. de locato; — l. 19, eod.

<sup>a</sup> L. 11, § 2, D. de act. empt. et vend.

<sup>b</sup> L. 38, D. de act. et vend.

<sup>c</sup> L. 1, D. de evict.; — v. l. 60 et 70, eod.; — l. 11, § ult. D. de act. empt. et vend.



## IV.

269. *The Fourth Engagement relates to the Faults of the Thing sold.* — Since people buy things only to employ them to the uses for which they are destined, this is a fourth engagement which the seller is under to the buyer, to take back the thing sold, if it has such faults and defects as render it unfit for its use, or too troublesome, or to diminish the price of the thing; whether the defects were known to the seller or not.<sup>d</sup> And if he knows them, he is obliged to declare them.<sup>e</sup> The rules of this engagement shall be explained in the eleventh section.

## OF DELIVERY.

## V.

270. *The Definition of Delivery.* — Delivery is the transferring of the thing sold into the power and possession of the buyer.<sup>f</sup>

## VI.

271. *The Delivery of Movables.* — The delivery of movables is made, either by transporting them into the power and possession of the buyer,<sup>g</sup> or without this transportation, by the delivery of the keys, if the things sold are kept under lock and key,<sup>h</sup> or by the bare will of the seller and buyer, if the things could not be transported;<sup>i</sup> or if the buyer had already the thing sold in his custody by another title, as if it was deposited into his hands, or if he had borrowed it.<sup>j</sup>

## VII.

272. *Delivery of Immovables.* — The delivery of immovables is made by the seller, when he quits the possession of the thing, that the buyer may take it;<sup>k</sup> whether it be by delivering the deeds and writings, if there be any;<sup>l</sup> or the keys, if it is a place shut up, such as a house, a park, a garden;<sup>m</sup> or by carrying the

<sup>d</sup> L. 13, *D. de act. empt. et vend.*<sup>e</sup> L. 1, § 1, *D. de cod. ed.*<sup>f</sup> L. 3, *D. de act. empt. et vend.*; — l. 20, *D. de acq. rer. dom.*; — l. 9, § 3, *cod.*<sup>g</sup> L. 20, *D. de acq. rer. dom.*; — l. 9, § 3, *cod.*<sup>h</sup> § 43, *Inst. de rer. divis.*; — l. 1, § 21, *in f. D. de acq. vel amitt. poss.*; — l. 74, *D. de contr. empt.*<sup>i</sup> L. 1, § 21, *D. de acq. vel amitt. poss.*<sup>j</sup> L. 9, § 5, *D. de acq. rer. dom.*; — § 44, *Inst. de rer. divis.*<sup>k</sup> L. 3, § 1, *D. de act. empt. et vend.*<sup>l</sup> L. 1, *C. de don.*<sup>m</sup> L. 9, § 8, *D. de acq. rer. dom.*

buyer upon the place; or only showing him it at a distance;<sup>p</sup> or by consenting that he take possession of it;<sup>q</sup> or by the seller's acknowledging that, if he continue to possess it, it shall be only precariously; that is, in the same manner as he who possesses a thing belonging to another person, on condition to restore it to the owner, whenever he shall be pleased to call for it.<sup>r</sup> And if the seller reserves for himself the use and profits, this reservation shall likewise be in the place of delivery.<sup>s</sup>

## VIII.

273. *The Clause of Precarious Possession tacitly understood.* — If the clause of precarious possession has been omitted in a contract for selling an immovable thing, it is tacitly understood, as to the effect of giving the buyer a right to take possession of the thing, if it is not already possessed by others. For the sale transferring the property of the thing, it implies the consent of the seller that the buyer should take possession of it.<sup>t</sup>

## IX.

274. *Delivery of Things Incorporeal.* — Things incorporeal, such as an inheritance, a debt, or any other right, cannot properly be delivered,<sup>u</sup> no more than touched;<sup>x</sup> but the power of using them is in lieu of delivery. Thus, the seller of a right of service does as it were deliver it, when he suffers the buyer to make use of it.<sup>y</sup> Thus, he who sells or transfers a debt, or any other right, gives to the buyer or assignee a kind of possession by the power which he gives him to exercise this right, in causing the transfer or assignment to be intimated to the debtor, who, after the said intimation, cannot own any other master or possessor of this right but the assignee to whom it is transferred.

## X.

275. *The First Effect of the Delivery is the Translation of the*

<sup>p</sup> L. 18, § 2, *D. de acq. vel amit. poss.*

<sup>q</sup> L. 12, *C. de contr. empt.*

<sup>r</sup> L. 6, § 2, *D. de precario*; — *l. ult. eod.*; — *l. 1, eod.* See the second article of the first section of the *Loan of Things to be restored in Specie*, and of a *Precarious Loan*.

<sup>s</sup> L. 28, *C. de donat.*; — *l. 85, § ult. eod.* See the third article of the second section of *Donations*. This article regards only the delivery, and not the ways of taking possession of which mention shall be made in the title of *Possessions*.

<sup>t</sup> L. 3, § 1, *D. de act. empt. et vend.*; — *l. 12, C. de contr. empt.*

<sup>u</sup> L. 43, § 1, *D. de acq. rer. dom.*

<sup>x</sup> § 2, *Inst. de reb. corp.*

<sup>y</sup> *L. ult. D. de servit.*

*full Property.* — The first effect of the delivery is, that, if the seller is the right owner of the thing sold, the buyer becomes at the same time fully master of it, and acquires a right to enjoy it, to use it, and to dispose of it,<sup>a</sup> he paying the price, or giving surety to the seller; unless the seller is contented with the simple bond or promise of the buyer.<sup>a</sup> And it is this effect of the delivery which is the perfect accomplishment of the contract of sale.

## XL

276. *Another Effect of the Delivery, with Respect to him who has bought the Thing honestly from one who was not the right Owner; and that is the Right of enjoying it.* — If the seller was not the right owner of the thing sold, the buyer does not become master of it by having it delivered to him.<sup>b</sup> But if he has bought the thing honestly and fairly, believing that the seller was master of it, he looks upon himself, and is so looked upon by others, as if he were in effect the true owner of the thing. And this possession of the buyer's, which he has ground to believe to be a rightful and lawful possession, ought to have the same effect as if he were really and truly master of the thing. Thus he possesses it, enjoys it, and makes the fruits his own, without being in danger of restoring what he has used and consumed during the time he was ignorant that the thing belonged to another person.<sup>c</sup>

<sup>a</sup> L. 20, C. de pact. ; — § 40, Inst. de rer. divis. ; — l. 31, D. de acq. rer. dom.

<sup>b</sup> § 41, Inst. de rer. div. ; — l. 19, D. de contr. empt. ; — l. 53, cod. This article is not contrary to what has been said in the second article of the first section, that the sale is perfected by the bare consent. For we must distinguish in the contract of sale, and in all other contracts which are perfected by the bare consent, two sorts, or two degrees of perfection.

The first sort is that which is mentioned in the second article of the first section; and the second is that which is here spoken of in this tenth article. The difference betwixt them consists in this, that the bare consent forms only the engagement of the contractors to perform reciprocally what they promise to one another. Thus, the seller is bound to deliver the thing sold, and the buyer to pay the price; and it is in this sense that the contract of sale is perfected by the bare consent. But there is still wanting a second accomplishment, which consists in the execution of those engagements, and has this effect; that whereas the contract of sale without delivery does not make the buyer master and possessor, and does not give him a right to enjoy, to use, and to dispose of the thing sold, but only a right to demand the delivery of it, this delivery of the thing, together with the payment of the price, consummates the sale, and makes the buyer fully master and possessor of the thing; which was the end of the contract of sale. See, concerning these accomplishments of the sale, the fourteenth and fifteenth articles of the twelfth section, as also the sixth law, Cpd. de harred. vel act. vend.

<sup>c</sup> L. 20, D. de acq. rer. dom.

<sup>d</sup> Si quis a non domino, quem dominum esse crediderit, bona fide fundum emerit, vel

## XII.

277. *Another Effect of the Delivery, the Right to prescribe.*—Another effect of the delivery of the thing sold, although the seller were not the master of it, is, that the buyer, who believes the seller to be the right owner, prescribes; and acquires the property after a sufficient possession, that is conformable to the rules which shall be explained in the titles of *Possession*, and *Prescriptions*.<sup>d</sup>

## XIII.

278. *Another Effect of the Delivery between two Buyers of the same Thing.*—If the same thing is sold to two buyers, whether by the same person or by two different sellers, the first of the two to whom it had been delivered, and who is in possession of it, will be preferred, although the thing was sold first to the other person; unless it be that one of the sellers was not the master of the thing sold, and that the other was; for in this case he who bought it of the master will be preferred to him to whom the thing was delivered.\* And in all the cases, the other buyer will have his action of warranty against his seller.<sup>f</sup>

ex donatione, aliave qualibet justa causa, neque bona fide acceperit, naturali ratione placuit, fructus quos percepit ejus esse pro cultura et cura. Et ideo, si postea dominus supervenerit, et fundum vindicet, de fructibus ab eo consumptis agere non potest. § 35, *Inst. de rer. div.* Dolum auctoris bonæ fidei emptori non nocere, certi juris est. L. 3, C. de per. et com. rei vend. To understand rightly the meaning of these words, *pro cultura et cura*, which are in the thirty-fifth section, *Inst. de rer. div.*, it is fit to take notice of the words of the twenty-fifth law, *D. de usur.*,—*omnia fructus non jure seminis, sed jure soli percipiuntur*. And likewise the possessor who comes fairly and honestly by the possession does enjoy the fruits which grow without sowing and without cultivating.

<sup>d</sup> L. 43, *D. de acq. vel amitt. poss.*;—l. 26, *cod.*

\* L. 9, § 4, *D. de public. in rem act.*;—l. 31, § 2, *D. de act. empt. et vend.*;—l. 15, *C. de rei vend.*

<sup>f</sup> L. 6, *C. de hered. vel act. vend.* This rule may seem contrary to that which is contained in the second article of the first section, and to the rule of the second article of the seventh section. For by these two rules the sale is so far accomplished by the bare effect of the consent, that, if the thing sold perishes before it is delivered, the loss is the buyer's; from whence it would seem to follow that the buyer was already master of the thing, and that therefore by the second sale the seller sold the thing belonging to another person, and that the first buyer may claim it as his. But, as we have already remarked on the tenth article of this section, it is only by the delivery that the sale receives its full accomplishment, which makes the purchaser master of the thing sold. Thus, he who buys the last, but of the seller who has the thing still in his possession, and gets possession of the thing, is preferred to the first buyer, who has himself to blame for not taking possession of the thing, in order to make himself master of it. And it is likewise for the interest of the public, that persons should not be disturbed in their possessions by sales transacted in private, or antedated. It is upon these principles that some customs have expressly determined, that a second purchaser of an estate, who gets first possession of it, is preferred to him who had bought it first.

## XIV.

279. *Of the Time of Delivery.*—The delivery of the thing sold ought to be at the time regulated by the contract. And if the contract says nothing of it, the seller ought to deliver the thing without delay; unless the delivery should require that the thing be transported into another place, for the doing of which a delay would be necessary.<sup>s</sup>

## XV.

280. *Of the Place of Delivery.*—The delivery ought to be in the place agreed on. And if the contract makes no mention of the place of delivery, the seller ought to deliver the thing sold in the place where it happens to be at the time; unless the intention of the contractors seems to demand that the delivery should be made in another place.<sup>h</sup>

## XVI.

281. *Damages for the Delay of Delivery.*—If the seller fails to deliver the thing sold on the day and at the place where the delivery ought to be made, he shall be bound to make good the damages which the buyer shall sustain by his delay,<sup>i</sup> pursuant to the rules which follow.

## XVII.

282. *Wherein consist the Damages.*—The seller who is in delay to deliver the thing sold is accountable for the damage which his delay shall have occasioned, according to the condition of the thing and the circumstances. Thus, the seller of an estate, who is in delay to deliver it, ought to restore to the buyer the value of the fruits which he has hindered him from enjoying. Thus, he who was obliged to deliver on a certain day, in a certain place, corn, wine, or other provisions, of which the price has risen on the day and at the place where they were to have been delivered, is bound to pay to the buyer the value at which they stood on the day and at the place appointed for delivery, in order to make up either the profit which the buyer might have made by selling the

<sup>s</sup> L. 41, § 1, *D. de verb. obl.*; — § 2, *Inst. cod.* See the fifth article of the third section of *Covenants*.

<sup>h</sup> See the sixth article of the third section of *Covenants*. *V. l. ult. D. de con. trit.*; — l. 22, *in fine, D. de reb. cred.*

<sup>i</sup> L. 1, *D. de act. empt. et vend.*; — l. 11, § 9, *cod.*; — l. 4 et 10, *C. cod.*

things again at the place, or the loss which he suffers, if, for his own use, he was obliged to buy others at a higher price than what he had agreed to give at the time of the sale.<sup>1</sup>

## XVIII.

**283. Consequences of Gain, or Loss, which enter not into the Damages.** — The profit or loss, which is to be computed as part of the damages of the buyer, ought to be restrained to that which may be imputed to the delay, and which is a natural and ordinary consequence of it, and which it was easy to foresee: such as the damages explained in the case of the preceding article; and such as would likewise be, in the same case, the charges which the buyer had been at, in going to receive and to transport the provisions which he had bought, and the other immediate consequences which it is natural to expect from the delay. But we ought not to extend the damages to consequences that are remote, and altogether unforeseen, which are rather an extraordinary effect of some event, and of some conjuncture of affairs flowing from the divine providence, than of the delay of the delivery. Thus, for example, if, the seller not delivering at the time and place corn which he has sold, the buyer has, for want of having the corn delivered to him, missed an opportunity of sending that corn to another place, and of selling it there at a higher rate than it was at in the place where it ought to have been delivered. Or if, for want of having that corn, he has been obliged to send away workmen, and put a stop to a work, the interruption of which occasions him a considerable loss, the seller will not be bound to make good either this gain which the buyer has missed of, or this damage which he has suffered, which are not so much consequences that may be imputed to the delay of the delivery, as effects of the divine providence, and accidents for which no man ought to be accountable.<sup>2</sup>

## XIX.

**284. Damages are due, whether the Sale subsists or not.** — Beside the damages which the seller is liable to for not delivering the thing sold, he incurs likewise on the same account another penalty, which is, that the sale may be annulled, if there is ground for it.

<sup>1</sup> L. 21, § 1, *D. de act. empt. et vend.*; — l. 21, § 3, *D. de act. empt. et vend.*; — l. ult. *D. de conduct. trit.*; — l. 59, *D. de verb. obl.*

<sup>2</sup> L. 21, § 3, *D. de act. empt. et vend.*; — l. 43, in *f. D. cod.* See the title of *Interests, Costs and Damages, and Restitution of Fruits.*

As, for instance, if he who was obliged to deliver a merchandise on the day of an embarkation, or on the day of a fair, fails to do it, he will be obliged to take back his goods, if the buyer pleases, and to restore the price, if he has already received it. And he will be, moreover, bound to make good the damages for not having delivered the goods at the time and place appointed. And even in the cases where the sale subsists, the seller is nevertheless bound to make good the damages. Thus, the seller who, by delaying to deliver an estate which he has sold, deprives the purchaser of the enjoyment of the fruits, is bound in the value of the fruits, although this delay be not enough to annul the sale.<sup>a</sup>

## XX.

285. *It does not depend on the Seller to annul the Sale, by his Failing to deliver the Thing.*—It never depends on the seller to elude the effect of the sale, by his failing to make delivery of the thing; and he may be always forced to deliver it, if it is possible, provided that the buyer performs his part of the contract. In the same manner, likewise, the buyer cannot procure the sale to be annulled, by his not paying the price at the term appointed,<sup>b</sup> as shall be made appear in the proper place.

## XXI.

286. *The Delivery hindered by an Accident.*—If the delivery is hindered by an accident, as if the seller had been robbed of the thing sold (that is, if it has been taken from him by force), the seller will not be liable to damages;<sup>c</sup> unless the accident happened after he was in fault for not delivering it, according to the rule explained in the third article of the seventh section.

## XXII.

287. *If the Seller is in Hazard of losing the Price, he is not obliged to deliver the Thing.*—If the seller is in manifest danger of losing the price, through the insolvency of the buyer, or for other causes, he may keep the thing sold by way of pledge, until the buyer has given him security for his payment.<sup>d</sup>

<sup>a</sup> This rule is a consequence of the former.

<sup>b</sup> V. l. 2 et 6, *D. de lege commiss.*;—l. ult. *C. ad Vall.*;—l. 5, *C. de obl. et act.* See the nineteenth article of the fourth section of *Covenants*, and the ninth article of the following section.

<sup>c</sup> L. 31, *D. de act. empt. et vend.*;—l. 3, *Inst. de empt.*

<sup>d</sup> In the same manner as the buyer cannot be obliged to pay the price, if he is in dan-

## XXIII.

288. *The Seller and Buyer both in Delay.*—If the buyer and seller are equally in delay, the one in receiving, and the other in delivering, the buyer, whose fault it is that he did not sooner receive the thing sold, cannot complain of the delay of the delivery.\*

## OF THE CUSTODY OF THE THING SOLD.

## XXIV.

289. *What Care the Seller ought to take of the Thing sold.*—If the thing sold remain in the custody of the seller, he is obliged to take care of it until the delivery; not only in the same manner as he takes care of what is his own, but he is to take the same care of it as he who has borrowed a thing for his own use.\* And he is to be accountable, not only for what he may do knavishly, but for every neglect and every fault which a careful and diligent master of a family would not readily fall into.<sup>1</sup> Because the contract of sale is as much for the interest of the seller as of the buyer.<sup>2</sup>

## XXV.

290. *The Care which the Seller is to take may be regulated by Agreement.*—If it is agreed to ease the seller of the trouble of looking after the thing sold, or if the parties have regulated the manner in which the seller shall be bound to take care of it, he will be no further obliged, than to take such care as is specified in the agreement.\* And, moreover, he will be accountable for whatever may happen through his knavery; or through any neglect of his which is so gross as to border upon fraud.<sup>3</sup>

ger of an eviction. *L. 18, § 1, D. de per. et com. r. v.; — l. 31, § 8, D. de acd. ed.; — v. l. 22, D. de hæred. vel act. vend.* See the Eleventh article of the third section.

\* *L. 51, D. de act. empt. et vend.; — l. 17, D. de contr. empt.*

<sup>1</sup> *Custodiam venditor talem præstare debet, quam præstant hi, quibus res commodata est, ut diligentiam præstat exactiorem, quam in suis rebus adhiberet. L. 3, D. de per. et commodo rei vend.* See the second article of the second section of the *Loan of Things to be restored in Specie*.

<sup>2</sup> *Si venditor eam diligentiam adhibuisset in insula custodienda, quam debent homines frangi, et diligentes præstare, si quid accidisset, nihil ad eum pertinere. L. 11, cod. Dolum, et culpam recipiunt mandatum, commodatum, venditum. L. 23, D. de reg. jur. In his quidem et diligentiam. D. l. 23. Talis custodia desideranda est a venditore, qualem bonus paterfamilias suis rebus adhibet. L. 35, § 4, D. de contr. empt.*

<sup>3</sup> *Ubi utriusque utilitas vertitur, ut in empto, — et dolus, et culpa præstatatur. L. 5, § 2, D. de commod.*

\* *L. 23, D. de reg. jur.; — l. 35, § 4, D. de contr. empt.*

<sup>1</sup> *D. l. 23, D. de reg. jur.* <sup>2</sup> *L. 29, D. mand.*



## XXVI.

291. *If it is the Buyer's Fault that he does not receive the Goods, the Seller is discharged from his Obligation to take Care of them.*— If the buyer is in delay to receive the thing sold, whether it be after the term fixed for the delivery, or after giving the buyer warning, if no term is fixed, the seller shall be discharged from his obligation to take care of it, and shall be no further liable than for what may happen through his knavery.<sup>a</sup>

## OF WARRANTY.

292. Warranty being a consequence of eviction, the rules concerning it shall be explained in the tenth section, which treats of this matter.

## OF DECLARING THE FAULTS OF THE THING SOLD.

293. The engagement which the seller is under to declare the faults of the thing sold, is a part of the matter of redhibition; and the rules concerning it shall be explained in the eleventh section.

294. *The Engagement of the Seller not to sell too dear.*— I have not set down in the number of engagements under which the seller is to the buyer, the natural duty of not selling too dear; \* because there would be too many inconveniences in annulling sales on account of excess in the price. And the civil policy connives at an injustice which the buyers usually suffer willingly; and restrains it only in the sale of such things as have their price regulated by the public.

## SECTION III.

## OF THE ENGAGEMENTS WHICH THE BUYER IS UNDER TO THE SELLER.

295. *The Engagement of the Buyer not to buy at too low a Price.*— The principal engagement which the buyer is under to the seller is that of humanity, and of the law of nature, which obliges him not to take advantage of the necessitous condition of the seller, to buy the thing at too low a price.<sup>a</sup> But because of the

<sup>a</sup> L. 17, D. de per. et com.; — l. 4, § ult. cod.

<sup>b</sup> Levit. xxv. 14; — 1 Thess. xxv. 6.

<sup>c</sup> Levit. xxv. 14.

difficulties in fixing the just price of things, and of the inconveniences, which would be too many and too great if all sales were annulled in which the things were not sold at their just value; the laws connive at the injustice of buyers, with respect to the price of sales, except in the sale of lands, where the price given for them is less than the half of their just value;<sup>b</sup> pursuant to the rules which shall be explained in the ninth section; and in this section we shall only insert the other engagements which the buyer is under to the seller.

## ART. I.

296. *Engagement of the Buyer to pay the Price.* — The first engagement which the buyer is under is to pay the price, and to pay it on the day and at the place regulated by the sale; whether it be at the time of the delivery of the thing sold, or before, or after, according as has been agreed on. For the buyer does not become master of the thing sold but by this payment, or by some other surety which is in lieu of it.<sup>a</sup>

## II.

297. *The Time and Place of Payment.* — If there is nothing regulated by the sale, as to the time and place of payment, the buyer ought to pay the price at the time when and the place where the goods are delivered.<sup>b</sup>

## III.

298. *The Seller may detain the Thing sold for Lack of Payment.* — If the buyer does not pay at the time appointed, and the seller has not as yet delivered the goods, he may keep them by way of pledge until he be paid.<sup>c</sup>

## IV.

299. *Delay caused by an Accident.* — The buyer is not faulty for not making payment, if he delays it only because of an obstacle which he meets with from some accident. As if the overflowing

<sup>a</sup> See the preamble to the title of the *Vices of Covenants*, and the second article of the third section of the same title.

<sup>b</sup> § 2, *Inst. de empt. et vend.*; — l. 19, l. 53, *D. de contr. empt.*; — § 41, *Inst. de rer. div.*

<sup>c</sup> L. 14, *D. de reg. jur.*; — l. 41, § 1, *D. de verb. obl.* See the fifth and sixth articles of the third section of *Covenants*.

<sup>d</sup> L. 31, § 8, *D. de act. ed.*; — l. 13, § 8, *D. de act. empt. et vend.*

of a river hinders him from going to the place where he ought to make payment.<sup>d</sup>

## V.

300. *The Interest of the Money is instead of all Damages occasioned by the Delay of Payment of the Price.*—The buyer is bound in no other damages, for the bare delay of paying the price, but the interest of the money.<sup>e</sup> And whatever loss the failure of payment may have caused, or whatever profit it may have prevented, the reparation of the damage occasioned by the failure of payment is reduced to the interest of the money; this being regulated by the law to be instead of all damages of this kind, as shall be explained in the title of damages.

## VI.

301. *Three Cases in which the Buyer owes the Interest of the Price.*—The buyer owes the interest of the price in three cases. By agreement, if it is stipulated. By a legal demand, if, after the term of payment is come, he pays not. And by the nature of the thing sold, if it produces fruits or other revenues, such as a field; or a house, the interest of the price is due without either covenant or legal demand.<sup>f</sup>

## VII.

302. *If the Seller takes back his Goods for Want of Payment.*—If, in default of payment of the price, the seller finds himself obliged to detain or to take back the thing sold, and its value be diminished, the buyer will be bound to indemnify the seller for this diminution, as far as the price which was agreed on amounts to.<sup>g</sup>

## VIII.

303. *Dissolution of the Sale for Non-payment.*—If the buyer does not pay at the term of payment after the delivery of the goods, the seller may demand the sale to be annulled for want of

<sup>d</sup> See the twenty-first article of the preceding section. *L. 3, § ult. D. de act. empt. vend.*

<sup>e</sup> *L. ult. D. de per. et comm. rei vend.*

<sup>f</sup> *L. 5, C. de pact. inter empt. et vend. comp.; — l. 5, C. de act. empt. et vend.; — l. 2, C. de usur.; — l. 13, § 20, D. de act. empt. et vend.; — l. 16, § 1, D. de usur.*

<sup>g</sup> This rule is a consequence of the nature of the contract of sale. For the sale being perfected, the full price is due, whatever change may happen to the thing sold, as shall be afterwards shown in the second article of the seventh section. *L. 1, D. de per. et com. r. v.; — l. 1, C. de per. et com. r. v.*

payment. And the judge will decree it to be void, either immediately, if there is danger that the seller lose both the thing and the price; or, if there is no danger of this, after a delay, according to the circumstances. And this delay is not refused, although it should be expressly mentioned in the contract, that the sale should be dissolved, if punctual payment were not made at the time appointed.<sup>b</sup>

## IX.

304. *It does not depend on the Buyer to elude the Sale by his not paying.* — It never depends on the buyer to elude the effect of the sale, by his failing to pay the price. And the seller hath it always in his choice to force him to make payment, if on his part he performs what he is bound to by the contract.<sup>1</sup>

## X.

305. *Another Engagement which the Buyer is under, as to the Expenses which fall to his Share to pay, and the Damages for which he is accountable.* — If, betwixt the time of the sale and delivery, the seller is obliged to be at any charge in preserving the thing sold; or if he sustains any damage by the delay of the buyer to take it away; as if materials that were sold take up a place, the rent of which must be paid, or, the place being the seller's own, he loses the rent of it; the buyer shall be bound to refund this charge, and to make good this damage.<sup>1</sup>

## XI.

306. *The Buyer is not obliged to pay the Price, if he is in Danger of an Eviction.* — If the buyer discovers before payment, that he is in danger of an eviction, and if he makes this appear, he cannot be compelled to pay the price till after he is secured in his possession.<sup>m</sup>

## XII.

307. *Another Engagement of the Buyer.* — This is another engagement which the buyer is under to the seller, that he is bound

<sup>b</sup> L. 23, in f. D. de obl. et act. See the eleventh and twelfth articles of the twelfth section of this title. V. l. 38, D. de min. in his verbis, lex commissoria displicebat ei.

<sup>1</sup> L. 2, D. de leg. commiss. ; — l. 3, eod.

<sup>1</sup> L. 13, § 12, D. de act. empt. et vend. ; — l. 9, D. eod.

<sup>m</sup> L. 8, § 1, D. de per. et comm. r. vend. See the twenty-second article of the second section.

to take care of the thing which he has bought, in all the cases where it may happen that the sale may be dissolved; whether by his own act and deed, as by his failing to pay the price, or by the effect of a clause of the contract, as if there were inserted in it a power of redemption. And in these and the like cases, the buyer ought to be responsible for the bad condition in which the thing may happen to be through his fault or negligence.

## SECTION IV.

OF THE MERCHANDISE, OR THING WHICH IS SOLD.

### ART. I.

308. *What Things may be sold.* — All sorts of things may be sold, except those of which the commerce is impossible, or prohibited by nature, or by some law,<sup>a</sup> pursuant to the rules which shall be explained in the eighth section.

### II.

309. *Things Incorporeal, such as Rights, may be sold.* — We may sell not only things corporeal, such as movables and immovables, animals, fruits; but likewise things incorporeal, such as a debt, an inheritance, a service, and all other rights.<sup>b</sup>

### III.

310. *Sale of Things to come.* — Sometimes things to come are sold, as the fruits which shall be gathered in a ground, the animals which shall be born, and other things of the like nature, although they are not as yet in being.<sup>c</sup>

### IV.

311. *Sale of an Uncertain Expectation.* — It happens likewise sometimes, that people sell an uncertain expectation, as when a fisherman sells a draught of fishes before he throws his net. And

<sup>a</sup> In the same manner, and for the same reasons, that the seller is obliged to take care of the thing sold before the delivery. See the twenty-fourth article of the foregoing section.

<sup>b</sup> L. 34, § 1, *D. de contr. empt.*

<sup>c</sup> *Tuto título D. et C. de hereditate vel actione vendita.*

<sup>d</sup> L. 8, *D. de contr. empt.*

although he catch nothing, yet the sale subsists; for it was the expectation that was sold, and the right of having whatever should be taken.<sup>d</sup>

## V.

**312. Sale in Gross and by the Bulk.** — We may sell a great many things at the same time, in one and the same sale, and for one and the same price, in gross and by the bulk; as if we sell all the goods that are in a shop, or in a ship, all the corn that is in a granary, or all the wine that is in a cellar.<sup>e</sup>

## VI.

**313. Sale by Number, Weight, and Measure.** — Provisions, or other things which are counted, weighed, or measured, may be sold either in gross or by the bulk, for one and the same price; or at the rate of so much for every piece, for every pound, for every bushel, or other measure.<sup>f</sup>

## VII.

**314. How Sales by Wholesale and Retail are accomplished.** — When provisions or other commodities are sold by the bulk, the sale is perfect at the same time that the parties are agreed about the goods, and the price, as in the sale of other things; because it is known precisely what is sold. But if the price is regulated at the rate of so much for every piece, for every pound, and for every measure, the sale is not perfect but as to so much as is counted, weighed, measured.<sup>g</sup> For the delay to count, weigh, and measure is, as it were, a condition which suspends the sale, till it be known by that what is sold.

## •VIII.

**315. Sale upon Trial.** — The things which the buyer reserves for sight and trial, although the price be agreed on, are not sold till after the buyer is satisfied with the trial, which is a kind of condition on which the sale depends.<sup>h</sup> But if the sale is already accomplished under this reservation, that if the buyer is not content

<sup>d</sup> E. 8, § 1, D. de contr. empt.

<sup>e</sup> L. 2, C. de per. et com. rei vind.; — l. 35, § 5, D. de contr. empt.

<sup>f</sup> L. 35, § 5, D. de contr. empt.; — d. l. § 6.

<sup>g</sup> L. 35, § 5, D. de contr. empt. See the fifth article of the seventh section.

<sup>h</sup> L. 34, § 5, D. de contr. empt.

with the thing sold within a certain time, the sale shall be dissolved, it will be a condition the event of which will annul the sale, which in the mean while is held to subsist.<sup>1</sup>

## IX.

316. *The Accessories of a Thing sold are included in the Sale.* — Whatever makes a part of the thing sold, or is an accessory to it, is included in the sale, unless it be reserved. Thus, the trees which are in a ground, the hanging fruits, the vine-props which are in a vineyard, the keys of a house, the pipes which convey water to it, the services, and whatever is fixed to the house with a design that it should remain there for ever, and the accessories of this kind, make a part of that which is sold, and belong to the purchaser.<sup>1</sup>

## X.

317. *Things separate from the Edifice, which are included in the Sale.* — Things which are not fixed to the edifice, but whose use is an accessory to it, as the rope and buckets belonging to a well; the cocks of a fountain, its vase, and other things of the same kind; and likewise those things which have been separated from the edifice with intention to fix them to it again, are accessories, and are included in the sale; but not such things as were intended to be fixed to it, and never were actually fixed. And in order to make a particular judgment of the cases in which all these sorts of accessories enter into the sale, or do not enter, it is necessary to consider the circumstances of the use of those things, of their destination to that use, of the place where they are at the time of the sale, of the condition of the places that are sold, and, above all, that of the intention of the contractors, thereby to discover what they intended should be comprehended in the sale, and what not.<sup>m</sup>

## XI.

318. *Accessories of Movables.* — The accessories of movables,

<sup>1</sup> L. 3, *D. de contr. empt.*; — l. 31, § 22, *D. de edil. ed.* See the thirty-eighth article of the eleventh section.

<sup>1</sup> L. 44, *D. de rei vind.*; — l. 13, § 10, *D. de act. empt. et vend.*; — d. l. 13, § ult.; — l. 17, in fine, *D. de ac. et empt.*; — d. l. 17, § 7. See upon this and the following article, the eighth article of the first section of the title of *Things*.

<sup>m</sup> L. 17, § 8, *D. de act. empt. et vend.*; — d. l. § 10; — l. 34, *D. de reg. jur.*; — l. 168, § 1, *cod.* See the eighth article of the second section of *Covenants*.

which may be separated from them, are included in the sale, or are not included, according to the circumstances. Thus, a horse being exposed to sale without his harness, the buyer will only have the bare horse; and if he is offered to sale with his harness on, the buyer will have all, unless in both cases it has been otherwise agreed on.<sup>a</sup>

## XII.

319. *In the Sale of one of two Things, the Choice belongs to the Seller.*— If a sale is made of one or other of two things, as of one of two horses, without mentioning whether the choice shall belong to the seller, or buyer, the seller may give which of the two he pleases.<sup>b</sup> For he is in the place of a debtor, and consequently may give that which is of least value.<sup>c</sup>

## XIII.

320. *Sale of a Thing belonging to another Person.*— Since it often happens that the possessors are not the right owners of what they possess; and that likewise the purchasers may not know whether the sellers are, or are not, the true owners of the things which they sell; it is natural that one should have power to sell a thing of which he is not master; and the sale subsists till the true owner makes his right appear, and dissolves the sale.<sup>d</sup>

# SECTION V.

## OF THE PRICE.

### ART. I.

321. *The Price of the Sale can be nothing else but Money.*— The price of the sale can never be any other thing than current money, which makes the estimate of the thing sold; and if for the price any other thing is given, or any work done, it will be either an exchange, or some other contract, but not a sale.<sup>e</sup>

<sup>a</sup> L. 38, D. de æd. ed.; — d. l. 38, § 11.

<sup>b</sup> L. 34, § 6, D. de contr. empt.

<sup>c</sup> See the fifteenth article of the second section of the title of *Covenants*, and the seventh article of the seventh section of this title.

<sup>d</sup> L. 19, D. de contr. empt.

<sup>e</sup> L. pen. C. de rer. perm.; — § 2, Inst. de empt. et vend.



## II.

322. *If, instead of the Price agreed on, the Seller receives another Thing in Payment.*—Although a sale cannot be made but by fixing the price in current money, yet the contractors may by the same contract agree to give, in payment, of the price of the sale, either movables, or debts, or other effects. And in this case there are, as it were, two sales, which it is necessary to distinguish. The first is, where the price is not paid in ready money; and the second is, that in which he who owes the price is, as it were, the seller of that which he gives to discharge himself of the price.<sup>b</sup> But although there are two sales in effect which are transacted between the same persons, yet, to avoid the multiplicity of acts, they are considered as one only act, in which the two sales are confounded, the second sale being eclipsed under the first. Thus, by contracting the ideas which distinguish these sales, the two are taken for one alone.<sup>c</sup> Because it happens that the same sum of money makes the price of both sales, and that each buyer discharges himself of the price of that which is sold to him without giving money, by giving, in lieu of the price, the thing which he sells on his part.

## III.

323. *One or more Prices of one and the same Sale.*—There is only one price of the sale, when one thing alone is bought, or many things by the bulk. But when things are bought by number, weight, or measure, each piece, each pound, each bushel, hath its price, according to the agreement.<sup>d</sup>

## IV.

324. *Price Uncertain and Unknown.*—The price of the sale is almost always certain and known; but it may happen that it is uncertain and unknown: as if it is referred to a third person to adjust the price, or if the buyer gives for the price the money which he shall make of such a business. In these and

<sup>b</sup> This is a consequence of the preceding article.

<sup>c</sup> *L. 3, § 12, D. de donat. inter vir. et ux.* There happen often such like occasions of confounding two acts into one, even among divers contractors. Thus, for example, if any person having a mind to give to another a sum of money, orders the money to be carried to him by a third person, who is his debtor, the same act of the delivery of the money which this debtor makes to the donee, will consummate both the deed of gift and the payment of the debt. *V. d. § 12.*

<sup>d</sup> See the sixth article of the fourth section, and the law which is there quoted.

such like cases, the price will not be certain and known, but by the estimation or other event, which shall fix it.\*

## V.

325. *The Price of Sales is arbitrary.* — There are some commodities, of which the price may be regulated for the public good; as it is, for example, in bread, and other things, in some countries. But setting aside these regulations, the price of things is undetermined. And since it ought to be differently regulated according to the different qualities of the things, and according to the plenty or scarcity both of money and of the commodities, the easiness or difficulty of the carriage, and the other causes which increase or diminish the value; this uncertainty of the price makes an extent of more and of less, which requires that the seller and buyer should adjust between themselves the price of the sale. And the injustices in the price are not restrained, except in so far as has been remarked in the beginning of the third section.<sup>f</sup>

## SECTION VI.

OF CONDITIONS AND OTHER FACTS IN A CONTRACT OF SALE.

## ART. I.

326. *We may add to the Contract of Sale what Pactions we will.* — We may add to the contract of sale, as well as to all other contracts, all manner of covenants and pactions that are lawful. Such as conditions, clauses of nullity, a power of redemption, and others.<sup>a</sup>

## OF CONDITIONS.

327. The rules touching conditions in sales are the same with those which have been explained in the fourth section of the title of covenants,<sup>b</sup> to which we need only add the following rules.

\* § 1, *Inst. de empt. et vend.*; — l. ult. *C. de contr. empt.*; — l. 7, § 1, *D. de contr. empt.*; — v. l. 7, § 1, et § ult. *D. de contr. empt.* See the eleventh article of the third section of *Covenants*.

<sup>f</sup> L. 1, § 11, *D. de off. præf. urb.*; — l. 8, *C. de resc. vend.*

<sup>a</sup> See the second article of the second section, and the first article of the fourth section of the title of *Covenants*.

<sup>b</sup> See the sixth article, together with those that follow, of the fourth section of the title of *Covenants*.

## II.

328. *Effect of the Condition on which the Sale depends.*—In the sales whose accomplishment depends on the event of a condition, all things remain in the same state as if there had been no sale, until the condition comes to pass. Thus, the seller remains master of the thing, and the fruits are his. But the condition being fulfilled, the sale is perfected, and hath the effects which it ought to produce.<sup>c</sup>

## III.

329. *Effect of the Condition which dissolves the Sale.*—In sales which are accomplished, and which may be dissolved by the event of a condition, the buyer remains master until that event. And in the mean while he possesses, enjoys, and makes the fruits his own; and he prescribes likewise, but his prescription is of no prejudice to the right of the person who is to become master by the event of the condition.<sup>d</sup>

## OF EARNEST.

## IV.

330. *The Earnest hath its Effect according to Agreement.*—The earnest penny is, as it were, a pledge which the buyer gives to the seller in money, or some other things; whether it be to signify more certainly that the sale is perfected;<sup>e</sup> or to be in place of payment of a part of the price; or to regulate the damages to be recovered of the party who shall fail to perform the articles of the sale. Thus the earnest given in the sale has the effect which the parties have agreed it should have.

## V.

331. *The Effect of the Earnest, when there is nothing said of it in the Contract.*—If there be no express agreement which regulates the effect which the earnest shall have, against the party who shall fail in performing the contract of sale; if it is the buyer, he shall lose his earnest; and if it is the seller, he shall give back, earnest, with as much more.<sup>f</sup>

<sup>c</sup> L. 7, D. de contr. empt.; — l. 8, D. de per. et com.

<sup>d</sup> L. 2, D. de in diem add.; — d. l. 2.

<sup>e</sup> L. 35, D. de contr. empt.; — Inst. de empt. et vend. See the following article.

<sup>f</sup> Inst. de empt. et vend.; — l. 17, in f. C. de fid. instr.

## OF THE CLAUSE OF NULLITY IN CASE OF NON-PAYMENT.

332. *Clause of Nullity*. — It is a usual agreement made in contracts of sale, that, if the buyer does not pay the price at the time appointed, the sale shall be void. And since this agreement makes a part of the matter of the dissolution of sales, it shall be explained in the twelfth section.

## OF THE POWER OF REDEMPTION.

333. *Power of Redemption*. — The power of redemption is an agreement, by which the seller is at liberty to take back the thing, he restoring the price. And this is another way of dissolving the sale, which shall be explained in the same place.

## SECTION VII.

OF THE CHANGES OF THE THING SOLD; AND HOW THE LOSS OR GAIN ACCRUING THEREBY BELONGS TO THE SELLER, OR TO THE BUYER.

334. *Change of the Thing sold*. — It often happens that, before the sale is entirely consummated, several events change the state of the thing sold; make it better or worse, augment or diminish it; and even that the thing perishes, either through its own nature, or by some casualty. And since these changes occasion profit or loss, which regards differently either the seller or buyer, provision is made for adjusting that matter by the rules which follow.

## ART. I.

335. *The Changes before the Accomplishment of the Sale regard the Seller*. — All the changes which happen before the sale is accomplished regard the seller, because the thing is still his, and the buyer has no right to it. And as the seller is at liberty not to finish and perfect the sale, if the thing happens to be better, so likewise the buyer has the same liberty, if there happens a change which makes it worse.\*

## II.

336. *The Changes after the Sale regard the Buyer*. — All the

changes which happen after the sale is accomplished regard the buyer. And if the thing perishes before the delivery, he bears the loss, and is nevertheless bound to pay the price. And he reaps the profit likewise of all the changes which make the thing better.<sup>b</sup> For after the sale the thing is looked upon to be his, and the seller keeps possession of it only with the buyer's consent, and with design to restore it to him.

### III.

337. *The Changes which happen after the Seller is in Delay for not delivering the Thing are at his Peril.*—If the changes which diminish the thing sold, or which destroy it, between the time of sale and the delivery, happen after the seller is in fault for not delivering it, he bears the loss, although the changes should happen without any fault of his, and even by pure chance.<sup>c</sup> And he loses both the thing, and the price, which he ought to restore, if he had received it. For if the thing had been delivered, the buyer might have either sold it, or prevented the loss some other way; and, in a word, the seller ought to blame himself for his delay in not delivering it in due time.

### IV.

338. *If both are in Delay.*—If, the delivery of the thing being delayed by the fault both of the seller and buyer, there happens a change which lessens the thing sold, or which destroys it altogether; the buyer cannot charge the seller with delay, since he himself being in delay, either by reason of his absence, or because of some other hindrance, or even through his negligence, he cannot say that the seller ought to have delivered the thing to him. But if the seller having been in delay offers afterwards to deliver the thing, matters being still entire, and the buyer delays to receive it; or if, on the contrary, the buyer having been in delay, and after-

<sup>b</sup> § 3, *Inst. de empt. et vend.*; — l. 1, *C. de per. et com.*; — l. 7, *D. eod.* See the following article. Although the buyer is not properly made master of the thing till after the delivery, he does nevertheless bear the losses which happen between the sale and the delivery. For the contract being finished, it has this effect, that the buyer may force the seller to deliver the thing sold, and that the seller possesses it only precariously, being under a necessity of delivering it up to the buyer. See the second article of the first section, and the tenth article of the second section.

<sup>c</sup> L. 12 et 14, *D. de per. et com. v.*; — l. ult. *C. eod.*; — l. 15, § ult. *D. de rei vindic.* See the tenth article of the third section of *Deposit*, and the second article of the fourth section of the title of *Damages occasioned by Faults*.

wards using his diligence, the seller does not deliver the thing; the changes which have happened during the last delay will fall upon him who has been last in fault for the thing's not being delivered.\*

## V.

339. *Of Things sold by Number, Weight, or Measure.* — In the sales of things which are sold by number, weight, or measure, all the diminutions and all the losses which happen before the things are counted, weighed, or measured, fall upon the seller; for until then there is no sale. And the changes which happen afterwards regard the buyer.\*

## VI.

340. *Sale upon Trial.* — If a thing is sold upon trial for a certain time, on condition that it shall not be sold, but in case it pleases the buyer, all the changes, and the profit or loss which happen before or during the time of trial, the sale not being as yet accomplished, will accrue to the seller, who is still the master.†

## VII.

341. *If, in the Sale of one of two Things, the one happens to perish.* — If one of two things is sold, whether the choice be left to the seller or buyer, and after the sale one of the two perishes, during the delay regulated for the choice, the seller is bound to give the other, although it should happen to be the best; for he owes one of the two. And if both perish, the buyer owes nevertheless the price; for, had it not been for this engagement, the seller might have rid himself of both the things; and that which the buyer was to have had is lost to him.\*

## VIII.

342. *If the Thing perishes before the Event of the Condition which ought to accomplish the Sale.* — In the sales of which the accomplishment depends on a condition, if the thing sold perishes before the event of the condition, the loss shall be the seller's, although the condition should come to pass afterwards. For he

\* L. 51, D. de act. empt. et vend.; — l. 17, D. de per. et comm. r. v.

† L. 1, § 1, D. de per. et com. See the seventh article of the fourth section.

\* L. 20, § 1, D. de presc. verb.; — d. l. in princ.; — l. 13, § 1, D. commod.

§ Z. 34, § 6, D. de contr. empt.

was still the master of it, and the thing being destroyed, it cannot any more be sold. And, in fine, it was understood by the contractors, that that only was sold which should be in being at the time that the condition should come to pass.<sup>a</sup>

## IX.

343. *If in the same Case the Thing is diminished, or becomes better.* — If in the same case the thing is not destroyed, but diminished, and the condition comes to pass which accomplishes the sale, the loss shall fall upon the buyer.<sup>1</sup> For the seller has been obliged to keep the thing for him until the event of the condition. And seeing this event makes the buyer master of the thing, he ought to bear this loss in the same manner as he would have reaped the benefit of the changes which would have made the thing better.<sup>1</sup>

## X.

344. *It does not depend on the Person who ought to perform a Condition, to take Advantage by his not performing it.* — When a condition is put in favor of one of the contractors, or which may turn to his advantage, if this condition depends on the act of the other party, either in part or in whole, the person who ought to fulfil the condition is not at liberty to fail in the performance of this engagement, that he may take advantage therefrom to the prejudice of the party whose interest it is that the condition be fulfilled. Thus, for example, if in a sale made on condition that the thing should be delivered on a certain day, and in a certain place, it happens in the mean while that the thing increases in price, it does not depend on the seller to annul the sale, and to keep that which he had sold, by failing to deliver it on the day, and at the place appointed, in order that he may profit by this change; for it was the buyer's interest that this condition should be fulfilled. And if, on the contrary, the thing diminishes in price, it does not depend on the buyer to hinder the effect of the sale, by absenting himself at the time, and from the place where the delivery was to be made; because it was the seller's interest that the goods should be delivered. Thus, in a sale made on condition that, if the buyer does not pay at the time fixed, the sale

<sup>a</sup> L. 10, § 5, D. de jur. dot.

<sup>1</sup> L. 10, D. de reg. jur.

<sup>1</sup> L. 6, D. de per. et com. v. v.

shall be void; if it happen in the mean while that the thing diminishes in its price, it does not depend on the buyer to annul the sale by failing to make payment, that he may thereby avoid taking the thing, and bearing the loss: for this condition was in favor of the seller, and not of the buyer.<sup>m</sup>

## XI.

— 345. *Loss occasioned by the Fault of one of the Contractors.* — In all sorts of cases, where the thing sold perishes, or becomes worse, by the fault of the seller or buyer, he whose fault has occasioned the loss ought to bear it, and to blame himself for it.<sup>n</sup>

## XII.

346. *The Fruits belong always to him who is Master at the Time they are gathered.* — We must not reckon among the changes which happen to things sold under condition, the fruits and revenues which they may produce. For they belong always to the person who is master of the thing at the time they are gathered, although it happen that by the event of the condition he is no longer master of it. Thus, in the sales of which the accomplishment depends on a condition, the fruits do in the mean while belong to the seller; although, if the condition happens which ought to accomplish the sale, the loss and the gain which may fall out in the mean while by the changes of the thing sold belong to the buyer. And in the sales which are perfected, and which may be annulled, by the event of a condition, the fruits in the mean while belong to the buyer; although, if the condition happens which dissolves the sale, the loss and gain which may accrue from the changes of the thing sold regard the seller.<sup>o</sup> Because, in all these cases, the changes that happen to the thing regard the person who is to be master of it, and he ought to have it in the condition in which it is; but the fruits and other revenues which fell due before the event of the condition having been separated from the thing sold, they remain with him who was at that time master of the thing.

<sup>m</sup> L. 3, C. de legib.; — l. 3, D. de leg. commiss. See the nineteenth article of the fourth section of Covenants.

<sup>n</sup> L. 203, D. de reg. jur.

<sup>o</sup> L. 2, D. de in diem add.; — l. 4, eod. See the text of the twentieth law, § 1, D. de præs. verb., already quoted on the sixth article of this section.



## XIII.

**347.** *If the Parties have regulated by Agreement on whom the Loss shall fall, they must hold to that.*—If there is any agreement in the contract of sale which derogates from the preceding rules, and which obliges either the seller or buyer to bear the loss which naturally did not belong to him, they must stick to the agreement.<sup>1</sup> For every one may renounce what is for his own advantage.<sup>2</sup>

## XIV.

**348.** *What is to be considered, in order to judge who ought to bear the Loss, and reap the Profit.*—It follows from all these rules concerning the changes that happen to the thing sold, that, in order to judge who ought to bear the loss, or reap the profit, it is necessary to consider what the thing is which is sold, and what enters into the sale; if the sale be perfected, or not; if it is pure and simple, or conditional; if, the sale being once accomplished, it is afterwards dissolved; if there is any delay in the delivery; if any fault has given occasion to the change; and the other circumstances, in order to know, by the state of things, who was the master at the time of the change, or who, without being master, ought to bear the loss, or reap the profit.<sup>3</sup>

## SECTION VIII.

## OF SALES THAT ARE NULL.

**349.** *What Sales are Null.*—By sales that are null are meant those which never did subsist; whether it be because of the incapacity of one of the contractors; or because the thing sold is not vendible; or through some vice in the sale, as if it be contrary to law and good manners; or through some defect, as if the sale ought not to take place but upon the existence of a condition which does not happen.

**350.** All the causes which annul covenants in general do like-

<sup>1</sup> L. 1, D. de per. et com.; — l. 10, cod.

<sup>2</sup> L. 29, C. de pact.; — l. 41, D. de mis. See the fourth article of the fourth section of *Covenants*.

<sup>3</sup> L. 8, D. de per. et com. See the eleventh article of the first section of the *Loss of Money*.

wise annul sales, pursuant to the rules which have been explained in the fifth section of the title of *Covenants*; and it will be sufficient here to take notice of the rules that are peculiar to nullities in sales.

OF PERSONS WHO CAN NEITHER SELL NOR BUY.

351. It was forbidden by the Roman law, to those who were in any public office, to purchase, in the places where they exercised their jurisdiction, either lands, or even movables, during the time of their administration, without express leave to do it; except it was in what they consumed for diet and clothing. And the same prohibitions extended likewise to their domestics.<sup>a</sup> But, in France, offices being perpetual, the officers may purchase of any persons that are willing to sell; and such like prohibitions with respect to them are limited to the purchases of estates, or rights, litigated in the court of which they are judges, and to other acquisitions which they may have extorted by concussion, or any other misdemeanour.<sup>b</sup>

ART. I.

352. *Tutors and Guardians cannot buy the Goods of those who are committed to their Care.* — Tutors, guardians, and other administrators can purchase nothing of the goods of minors, and other persons who are under their charge, either directly in their own names, or by the interposition of other persons.<sup>a</sup>

<sup>a</sup> *L. un. Cod. de contract. jud.*; — *d. l. §§ 2 et 3*; — *l. 46, l. 62, D. de contr. empt.*; — *l. 46, § 2, D. de jure fisci.*

<sup>b</sup> By the ordinances of *St. Lewis*, in 1254, of *Philip the Fair*, in 1520, and of *Charles VI.*, in 1388, it is prohibited to all bailiffs and seneschals to purchase immovables during the time of their administration.

By many ordinances, it is prohibited to officers and persons of great power and authority, or who have any privilege of having their causes tried only before certain judges, to accept of sales or assignments of rights, in order to carry the parties from one tribunal to another. And all judges, advocates, and proctors are likewise forbid to accept of sales or assignments of litigious rights. See the ordinances of *Charles V.* in 1356, of *Francis I.* in 1533, ch. 12. art. 23, of *Orleans*, art. 54, of *Lewis XII.* in 1498, art. 3, and in 1510, art. 17. See likewise the second article of the third section of *Payments*, and the remark that is there made.

It is likewise proper to take notice here of the prohibitions in the ordinance of *Orleans*, art. 109, to gentlemen and officers of justice, to deal in merchandise, and to take farms, either in their own names, or in the names of others for their behoof, under penalty to the gentlemen, of forfeiting their nobility; and to the officers of justice, of losing their places.

See the fourth article of the second section of the *Vices of Covenants*.

<sup>a</sup> *L. 34, § ult. D. de contr. empt.*; — *l. 5, § 3, D. de auct. et cons. tul.*; — *d. l. § ult.*

## II.

**353. Factors are under the same Incapacity.**—Factors, and those who are intrusted with the care of the affairs of others, cannot purchase the goods of those whose affairs are committed to their management,<sup>b</sup> unless they purchase them of the owners themselves.

## III.

**354. The Heir burdened with a Substitution.**—The heir or executor who is burdened with a substitution cannot sell the estate which he possesses only on condition to restore it.<sup>c</sup>

## IV.

**355. Minors and others.**—Minors, madmen, prodigals, and other persons who are debarred from the administration of their estates, cannot sell them; and their sales are null,<sup>d</sup> if they have not been made in due form.

## OF THINGS WHICH CANNOT BE SOLD.

## ;V.

**356. Things Public.**—Whatever nature and the laws make common, either to all mankind in general, or to a kingdom, or a town, cannot be sold. Thus, seaports, highways, public market-places, with the walls and ditches of towns, and all other things which this common and public use incapacitates for sale, cannot be sold.<sup>e</sup>

## VI.

**357. Things consecrated.**—Immorables belonging to Churches and Corporations. — Things consecrated, immovables belonging to churches and to corporations, to minors, madmen, declared prodigals, and to other persons who cannot dispose of their estates, cannot be sold, or otherwise alienated, unless for necessary causes; and the formalities prescribed in these kinds of sales must be strictly observed.<sup>f</sup>

<sup>b</sup> D. l. 34, § ult. D. de contr. empt.

<sup>c</sup> L. 7, C. de reb. al. n. al.

<sup>d</sup> L. 26, D. de contr. empt.; — § 8, Inst. de inutil. stip.; — tit. D. de reb. cor. qui sub tut. vel cura.

<sup>e</sup> L. 6, D. de contr. empt.

<sup>f</sup> L. 14, C. de sacros. eccl.; — Nov. 7; — Nov. 120; — l. 6, D. de contr. empt.; — tit. D. de reb. cor. qui sub tut.; — tit. C. de pced. et al. reb. min.; — r. l. 21, C. de sacros. eccl.

## VII.

358. *An Estate entailed.*—An estate subject to a substitution cannot be sold whilst the substitution lasts.<sup>a</sup>

## VIII.

359. *Dower Lands.*—The lands which a married woman brings along with her in dowry to her husband cannot be sold in the places where it is prohibited to alienate them, unless it be in cases that are excepted, and where the rules prescribed for such sales are observed.<sup>b</sup>

## IX.

360. *Things of which the Commerce is forbidden.*—Things of which the commerce is prohibited by some law cannot be sold; such as arms to an enemy, and other things of the like nature.<sup>1</sup>

## OF THE OTHER CAUSES WHICH ANNULL SALES.

## X.

361. *Sales null through the Default of a Condition.*—The sales of which the accomplishment depends on a condition remain null, if the condition does not come to pass; and it is the same thing if the thing sold perishes before the condition happens.<sup>1</sup>

## XI.

362. *Error in the Contractors.*—If the seller and buyer have erred, so that it appears that the seller meant to sell one thing, and the buyer thought of purchasing another, the sale will be null.<sup>2</sup>

<sup>a</sup> See the third article of this section.

<sup>b</sup> *Tit. D. de fundo dotal.*; — l. un. in *f. C. de rei uxor. act.* See the thirteenth article of the first section of *Dowries*.

<sup>1</sup> *Tit. C. quas res ven. non possunt, et tit. quon res export. non debent.* We have not set down here, among the rules touching things which cannot be sold, that rule of the Roman law which prohibits the alienation of things that are litigious, and annuls all such sales to whomsoever they are made. Because our custom has limited these prohibitions to sales made to persons who, by their authority or quality, are able to create trouble to those who pretend a right to what is in dispute; such as the judges, and other officers who have a share in the administration of justice. *V. tit. D. et Cod. de litigios.*, and the preambles to this section.

<sup>2</sup> *L. 8, D. de per. et com.*

<sup>3</sup> *L. 57, D. de obl. et act.*; — l. 9, *D. de contr. empt.* See the tenth article of the fifth section of *Contracts*.

And much more will it be so, if the seller sold knavishly one commodity for another.<sup>a</sup>

## XII.

363. *Error in the Qualities of the Thing sold.*—If the error is not in the substance of the thing sold, but in its qualities, we must judge by the circumstances whether the sale ought to subsist, or not.<sup>b</sup> And this depends on the rules which shall be explained in the eleventh section.

## XIII.

364. *Fraud and Violence.*—If the sale has been transacted by fraud or violence, it will be null; pursuant to the rules which shall be explained in the title of the *Vices of Covenants*.<sup>c</sup>

# SECTION IX.

OF THE RESCISSION OF SALES, ON ACCOUNT OF THE LOWNESS OF THE PRICE.

## ART. I.

365. *Damage in more than Half the Price.*—In the sales of immovables, if the price be less than the half of the real value, the seller may get the sale to be declared void.<sup>a</sup>

## II.

366. *Time of Estimation.*—The true price by which the damage is to be estimated is the value of the thing at the time of the sale.<sup>b</sup>

## III.

367. *In what Manner the true Value is estimated.*—Since there is always more and less in the price of things, the estimation of

<sup>a</sup> L. 14, in f. *D. de contr. empt.*

<sup>c</sup> V. totam l. 9, et seq. *D. de contr. empt.*

<sup>b</sup> L. 8, *C. de resc. vend.*

<sup>a</sup> L. 2, *C. de resc. vend.*; — l. 8, *cod.* See the fourth article. This rescission of sales on account of the lowness of the price is limited to sales in which the price does not amount to half the value of the lands; and the civil policy suffers sales, where the damage is less, to subsist; because it is for the interest of the public not to disturb the commerce of sales by too frequent rescissions.

<sup>b</sup> L. 8, *C. de resc. vend.*

the true price, by which we must examine if there is any damage, ought to be made according to the highest price that the thing might justly be worth at the time of sale; because that price is just, and we ought to favor the seller who is wronged.\*

## IV.

368. *The Buyer has it in his Choice to give back the Thing, or make up the full Price.*— If the thing is sold for less than the half of its just price, the buyer shall have it in his choice, either to restore the thing, and to take back the price which he has paid, or to make up the just price, and to keep the thing.<sup>d</sup>

## V.

369. *This Rescission is independent of Fraud.*— This rescission on account of the lowness of the price is independent of the honesty or knavery of the buyer. And whether he knew or was ignorant of the value of the thing sold, it suffices for rescinding the sale, that the price be less than the half of the true value.\*

## VI.

370. *Restitution of the Fruits against the Person who knows he has no good Title to the Possession.*— If there is no other defect in the sale besides the damage of more than the half of the just price, the buyer will be obliged to restore the fruits only from the time of the demand, or the interest of the remaining part of the price, if he keeps the thing. But if there were other vices in the sale, such as usury, fraud, or violence, he will be bound to make restitution of the fruits, even from the time of his possession of the thing, deducting the interest of the price which he has paid for it.<sup>f</sup>

\* It is a consequence of the motive of humanity, which has made this rescission to be received.

<sup>d</sup> L. 2, C. de resc. vend.

<sup>e</sup> D. l. 8, C. de resc. vend. Et si nullus dolus intercessit stipulantis, sed ipsa res in se dolum habet. L. 36, D. de verb. obl. This is what is called *dolum re ipsa*.

<sup>f</sup> L. 17, C. de resc. vend.

## SECTION X.

## OF EVICTION, AND OTHER TROUBLES TO THE PURCHASER.

## ART. I.

**371. Definition of Eviction.** — Eviction is the loss which the buyer suffers, either of the whole thing that is sold, or of a part of it, because of the right which a third person has to it.<sup>a</sup>

## II.

**372. Of the other Troubles.** — The other troubles are those which, without touching the property of the thing sold, diminish the right of the purchaser; as if any one pretends a right to the usufruct of lands that are sold, to a ground-rent, a service, or other charges of the like nature.<sup>b</sup>

## III.

**373. Warranty.** — The buyer from whom the thing is evicted, or who is troubled in his possession of it, or in danger of being so, has his recourse against the seller, who ought to warrant him, that is, to put a stop to the eviction, and other troubles, as shall be shown in the following articles.<sup>c</sup>

## IV.

**374. No Warranty against Violence, Casualty, or the Act of the Sovereign.** — The seller is not bound to warrant the buyer against acts of mere force and violence, casualties, or against the act of the sovereign.<sup>d</sup>

## V.

**375. Two Sorts of Warranty: Warranty in Law, and Warranty by Deed.** — Warranty being a consequence of the contract of sale, there is a first kind of natural warranty, which is called warranty in law, because the seller is obliged to it by law, although the sale make no mention of it. And it being in our power to augment or diminish our natural engagements by covenants, there is a second

<sup>a</sup> This definition results from the whole tenor of this section.

<sup>b</sup> These charges, diminishing the right of the purchaser, are troubles against which the seller ought to warrant him.

<sup>c</sup> L. 1, D. de evict. See the third article of the second section.

<sup>d</sup> L. 11, D. de evict.

kind of warranty, which is a warranty by deed, or covenant, such as the seller and buyer are pleased to regulate among themselves.<sup>a</sup>

## VI.

**376. Warranty in Law.** — Warranty in law, or natural warranty, is the security which every seller is bound to give for maintaining the buyer in the free possession and enjoyment of the thing sold; and for putting a stop to evictions, and other troubles that shall be given to the buyer by any person whatsoever, who shall pretend either a right of property, or any other right in the thing sold, by which the right which ought naturally to be acquired by the sale would be diminished. And the seller is obliged to this warranty, although it be not stipulated by covenant.<sup>c</sup>

## VII.

**377. Warranty by Deed.** — Warranty by deed, or covenant, is the security which the seller promises, either greater or lesser than what he is bound to by law, according as the parties have agreed between themselves. Thus, they may add to the warranty in law; as if it be agreed, that the seller should warrant the buyer against the act of the sovereign. And they may likewise restrain the warranty in law; as if it be agreed, that the seller should only warrant against his own proper act, and not against the rights of other persons, or that he shall only restore the price in case of eviction, and not the damages.<sup>e</sup> And all these agreements have their justice, in that the buyers purchase at a cheaper or dearer rate, or upon other views; and in that the purchaser buys in effect only what is sold, and such as the seller is willing to warrant it.

## VIII.

**378. The Seller cannot be discharged from the Warranty against his own proper Act.** — The seller cannot be discharged from the warranty against his own proper act and deed, not even by an express agreement; for it would be contrary to good manners that he should be allowed to act a dishonest part.<sup>b</sup>

<sup>a</sup> L. 11, § 1, *D. de act. empt. et vend.*

<sup>b</sup> L. 6, C. de evict.; — l. 11, § 2, *D. de act. empt. et vend.*; — l. 1, *D. de evict.*; — v. l. 10, cod.; — l. 11, § 8, *D. de act. empt. et vend.*; — l. 11, § 17, *D. de act. empt. et vend.*

<sup>c</sup> L. 11, § 1, *D. de act. empt. et vend.*; — d. l. 11, § 18.

<sup>d</sup> L. 1, § 7, *D. de pact.*; — l. 27, § 4, *D. de pact.*



## IX.

379. *Warranties regulated by Particular Customs.*—If besides the natural warranty, and the warranty by agreement, there is any particular custom, or usage, in a place, which prescribes any sort of warranty, the seller shall be bound to such warranty.<sup>1</sup>

## X.

380. *Damages for Eviction, and other Troubles.*—If the purchaser loses the thing by eviction, or is troubled in his possession, the warranty shall have its effect,<sup>1</sup> pursuant to the rules explained in the articles which follow.

## XI.

381. *Divers Effects of the Troubles which are given to the Seller.*—There are troubles which of their nature dissolve the sale; as when the proprietor evicts the thing from the purchaser.<sup>2</sup> Others there are which of their nature may dissolve or not dissolve the sale, according to the circumstances. Thus, an action in right of a mortgage does not annul the sale, if either the seller or purchaser acquits the debt; but if the estate is adjudged to the creditors, the sale is dissolved. And in all these cases, whether it be that the sale subsists or is dissolved, the seller is answerable for the damages according to the effect of the trouble.<sup>3</sup>

## XII.

382. *Restitution of the Price, with Damages.*—If the sale is dissolved by an eviction, the seller is bound to restore the price, and to indemnify the buyer for the damages which he may sustain thereby,<sup>4</sup> as shall be explained in the following articles.

## XIII.

383. *If the Thing is not changed at the Time of the Eviction.*—If the thing sold is in the same condition, and of the same value, at the time of the eviction, as it was at the time of sale, the seller shall be bound only to restore the price which he received, the charges of the drawing up of the contract, those of taking possession, and to make good the other damages, if there are any; as

<sup>1</sup> L. 31, § 20, *D. de sed. ed.*; — l. 6, *D. de evict.*

<sup>2</sup> L. 1, *D. de evict.*

<sup>3</sup> L. 70, *D. de evict.*; — l. 60, *cod.*

<sup>4</sup> L. 1, *D. de evict.*

<sup>5</sup> L. 70, *D. de evict.*

if the purchaser of an estate in lands which are evicted had paid a fine of alienation.<sup>p</sup>

#### XIV.

384. *If the Thing is diminished at the Time of the Eviction.* — If, on the contrary, the thing sold is wasted or diminished, whether by its own nature, as an old house, or by a casualty, as if a flood has carried away a part of an estate; or if, the thing being in the same condition, its value is diminished by the effect of time; in all these cases, and others of the like nature, where the thing sold is worth less at the time of the eviction than the price which the buyer paid for it; he can recover against the seller only the present value of the thing, such as it is at the time of the eviction.<sup>q</sup> For it is only in this present value that the buyer's loss doth consist. And as the diminution which preceded the eviction regarded the buyer, he ought not to be a gainer by the eviction.

#### XV.

385. *If the Thing has increased in Price.* — But if the thing happens to be worth more at the time of the eviction than it was at the time of sale, the price having been augmented by the effect of time, the seller shall be bound to the buyer for what the thing is worth at the time of the eviction. For he loses in effect this value, the thing being evicted from him; and his condition ought not to be made worse by this event, against which the seller is bound to warrant him.<sup>r</sup>

#### XVI.

386. *If the Purchaser has made Improvements.* — If the thing sold happens to be improved at the time of the eviction, by the act of the purchaser, as if he has either planted or built on an estate, he shall be indemnified by the seller as to what the estate would have been worth, at the time of the eviction, if it had not been improved; and he will moreover recover the expenses he has been at in improving it; and he cannot be turned out of possession, till he is reimbursed the said expenses, either by the person who evicts the estate, for he ought not to reap the profit of those

<sup>p</sup> L. 60, *D. de evict.*

<sup>q</sup> L. 70, *D. de evict.*; — L. 66, in *f. D. cod.*; — l. 64, *cod.*; — l. 45, *D. de act. empt. et vend.*

<sup>r</sup> L. 66, in *f. D. de evict.* See the preceding article, where this law is quoted. L. 45, *cod.*; — l. 1, *cod.*

improvements; or by the seller, who is bound to warrant him against the eviction. And he shall have his action both against the one and the other.\*

## XVII.

387. *The Regard which is to be had to the Fruits which have been reaped, in order to make an Estimate of the Improvements.*— In making an estimate of the charges laid out by the purchaser of an estate on improvements, as if he has made a plantation in it, we must balance the charges laid out with the fruits arising from the improvements, and which have increased the rent of the estate. So that if the fruits which the purchaser has reaped from the improvements acquit the principal sum and interest of the moneys laid out on them, there will be no reimbursement due; it being enough for the buyer that he loses nothing. And if the fruits come short of the charges laid out on the improvements, the purchaser will recover the remainder of the money he has laid out, both principal and interest;† for he ought to lose nothing. But if the fruits which the purchaser has reaped from the improvements exceed the charges he has been at, he shall have the advantage of them.

## XVIII.

388. *The Circumstances oblige us to regulate differently the Difficulties relating to the Improvements.*— If the charges laid out upon the improvements are less than their value, the purchaser who is evicted will recover only the charges he has laid out. And if, on the contrary, the charges exceed the value of the improvements, he will

\* L. 9, C. de evict.;—l. 16, eod.;—l. 45, § 1, D. de act. empt. et vend.;—l. 16, C. de evict. See the following articles, as also the twelfth and following articles of the third section of the title of *Dowries*. It is said in this ninth law, C. de evict., that the seller is bound to refund the charges of the improvements to the buyer from whom the estate is evicted. And in this forty-fifth law, § 1, D. de act. empt. et vend., that this reimbursement is to be made by the person who evicts, and ought not to fall upon the seller. Which ought to be understood in the sense explained in the article: and in such a manner, as that if, for example, he who would recover the lands pretends that he is not bound to refund the charges of the improvements, or raises any other dispute about them, the purchaser has his action of warranty against his seller.

† L. 16, C. de evict.;—l. 48, D. de rei vind.;—l. 65, D. eod. What is said in this article, that the buyer shall reap the profit of the fruits which are over and above his reimbursement, ought to be understood of the fruits which he reaped while he knew nothing of his title being called in question, and before any legal demand was made. See the third section of the title of *Interest, Costs, and Damages, and Restitution of Fruits*.

recover no more than the real value of the improvements. But, according to the circumstances, it will be prudent in the judge not to deprive the buyer of reasonable charges, such as the master of the thing might and ought to have laid out; and likewise not to overburden the seller, or the person who evicts. And it is necessary to regulate these matters according as the nature of the expenses may require, or the quality of the persons, the necessity or usefulness of the improvements, and whatever else may be fit to be considered in the state of the things.<sup>a</sup>

## XIX.

389. *If the Seller has sold the Goods of another Person, knowing them to be such.*—If, in the cases of the preceding article, the seller had sold that which belonged to another person, knowing it to be so, he would be bound to refund, without any distinction, all the charges laid out by the purchaser.<sup>a</sup>

## XX.

390. *He who is bound to warrant cannot evict.*—The persons who are obliged in warranty to the buyer cannot disturb him in his possession, whatever right they may have to the thing sold. Thus, the heir of the seller, being in his own right proprietor of the thing sold, cannot evict it from the buyer, whom he is obliged, by his quality of heir, to warrant in his possession.<sup>b</sup>

## XXI.

391. *If the Purchaser who is molested does not give Notice of it, or does any other Prejudice to the Condition of his Warrantor.*—If the purchaser who is molested suffers himself to be condemned by default; if he defends himself ill; if he does not give notice to the seller of the action that is brought against him; if he consents to a reference, or transaction, without the seller's knowledge; or if he in any other manner prejudices the condition of his warrantor, he cannot demand warranty against an eviction, which he has nobody to blame for but himself.<sup>c</sup>

<sup>a</sup> L. 38, D. de rei vind.; — l. 25, in f. D. de pign. act. See the nineteenth article of the third section of *Mortgages*.

<sup>b</sup> L. 45, § 1, in f. D. de act. empt. et vend.\*

<sup>c</sup> L. 1, D. de except. rei vend.; — d. l. § 1; — l. 14, C. de rei vind.

<sup>d</sup> L. 55, D. de evict.; — l. 53, § 1, cod.; — l. 56, § 1, cod.; — v. l. 63, cod.

## XXII.

392. *The Buyer is only bound to give Notice to the Seller of the Disturbance that is given him.* — After that the buyer has intimated to the seller the action that is brought against him, he is not bound either to defend it, or to appeal if he is condemned. And whether he defends it or not, the seller will remain bound to warrant him against the event.<sup>a</sup>

## XXIII.

393. *Warranty may be demanded before the Purchaser is molested.* — If the purchaser discovers that the seller has sold him that which belongs to another person, and which the seller knew to be such, he may bring his action against the seller, although he be not as yet disturbed in his possession, to oblige him to remove the danger of the eviction; and to recover the damages which he may suffer by such a sale.<sup>b</sup>

## XXIV.

394. *Warranty of Law in the Sale of Rights.* — As in the sales of movables and immovables, natural warranty obliges the seller to deliver and warrant a thing which is in being; so likewise in the sales or conveyances of rights, such as a debt, an action, an inheritance, natural warranty obliges the transferer to transfer a right which subsists, a debt which is due, an inheritance which has fallen, an action which may be prosecuted. And if the transferer had not the right which he sells and transfers, the sale would be null; and he would be bound to restore the price, and to make good the damages of the buyer or transferee.<sup>c</sup>

## XXV.

395. *Warranty in the Sale of an Inheritance.* — The heir who sells and transfers an inheritance, without specifying the goods contained in it, the rights, or the charges, is bound to warrant nothing but his quality and right of heir; for it is that which he sells. And he is not bound to warrant either any charge, or any particular goods, or any right belonging to the inheritance; unless

<sup>a</sup> L. 63, § 1, D. de evict.

<sup>b</sup> L. 30, § 1, D. de act. empt. et vend.

<sup>c</sup> L. 1, D. de herred. vel act. vend.; — l. 7, cod. — l. 8, in f. et l. 9, cod.; — l. 4, cod. See the twenty-sixth article.

he be expressly obliged to it by covenant.<sup>a</sup> But if he had already received any profit from any thing belonging to the inheritance, he ought to restore it to the person to whom he sells the inheritance, as being included in the sale, unless he has expressly reserved it.<sup>c</sup>

## XXVI.

396. *Warranty in the Sale of a Debt.*—He who sells and transfers a debt ought only to warrant that what he transfers is really and truly due to him. And he is not to warrant the debtor to be solvent, unless he is obliged to it by the conveyance he has made to him of the debt.<sup>f</sup> For it is only a right which he sells.

## SECTION XI.

### OF REDHIBITION AND ABATEMENT OF THE PRICE.

#### ART. I.

397. *Definition of Redhibition.*—By redhibition is meant the dissolution of the sale, because of some fault or defect in the thing sold, which is such that it is sufficient to oblige the seller to take back the thing and to annul the sale.<sup>a</sup>

#### II.

398. *The Seller ought to declare the Defects of the Thing sold.*—The seller is obliged to declare to the buyer the defects of the thing sold, which are known to him.<sup>b</sup> And if he has not done it, either the sale shall be annulled, or the price diminished, according to the quality of the defects; and the seller shall be bound to make good the damages of the buyer by the rules which follow.

#### III.

399. *Distinction of the Defects of the Things sold.*—Since it is not possible to restrain all the perfidious dealings of sellers, and that the inconveniences would be too great to dissolve or call in

<sup>a</sup> L. 2, D. de hered. vel act. vend.; — l. 1, C. de evict.; — l. 14, in f. et l. 15, D. de hered. vel act. vend.; — l. 2, § 9, cod.

<sup>b</sup> L. 2, § 1, cod.

<sup>c</sup> L. 4, D. de hered. vel act. vend.; — l. 74, in f. D. de evict.

<sup>d</sup> L. 21, D. de edil. ed.; — l. 1, § 1, in fine, cod.

<sup>e</sup> L. 1, § 1, D. de edil. ed.

question sales, for all manner of defects in the things sold; we consider, therefore, only those defects which render the things altogether unfit for the use for which they are bought and sold, or which diminish that use in such a manner, or render it so inconvenient, that, if they had been known to the buyer, he would have either not bought them at all, or at least not given so great a price for them. Thus, for example, a beam that is rotten is unfit for the use for which it is designed. Thus, a broken-winded horse does less service, and it is too troublesome to make use of him. And these defects are sufficient to dissolve a sale. But if a horse is only dull in answering the spur, this defect will make no manner of change. And in general, it depends on the custom of the place, if there is any such, touching this matter; or on the prudence of the judge, to discern by the quality of the defects whether the sale ought to be dissolved, or the price lessened, or whether any regard at all ought to be had to the defect.\*

## IV.

400. *Redhibition of Immovables.*—In the sales of immovables there may be ground for redhibition, or abatement of the price, if there are any defects which give occasion to it. Thus, the purchaser of a field may get the sale dissolved, if there arise out of that ground malignant vapors, which render the use of it dangerous. Thus, for a service which did not appear, and which the seller did not declare, the purchaser may procure an abatement of the price,<sup>a</sup> and even a dissolution of the sale, if the service is so very burdensome as to give occasion for it.

## V.

401. *Although the Seller be ignorant of the Defects, the Buyer has his Action.*—Although the defects of the thing sold were unknown to the seller, yet the buyer may procure the dissolution of the sale, or an abatement of the price, if these defects are such as give occasion for it.\* For since people buy a thing only for its use, if it chance to have any defect which hinders this use, or lessens it, the

\* L. 54, D. de contr. empt.; — l. 1, § 8, D. de adil. ed.; — l. 39, D. de act. empt. et vend.; — l. 35, in f. D. de contr. empt.

<sup>a</sup> L. 49, D. de adil. ed.; — l. 4, C. de adil. act.; — l. 2, § 29, D. ne quid in loc. publ.; — l. 35, in f. D. de contr. empt.; — l. 61, D. de adil. ed.

\* L. 1, § 2, D. de adil. ed.; — l. 21, § 1, D. de act. et empt. vend.; — l. 45, D. de contr. empt.; — l. 13, D. de act. empt. et vend.

seller ought not to reap the advantage of an apparent value, which the thing sold seemed to have, and yet had it not.

## VI.

402. *Damages, if the Seller is ignorant of the Defects.*—In the same case, where the defects of the thing sold were unknown to the seller, he shall be bound, not only to take back the thing, or to abate the price, but likewise to indemnify the buyer as to the charges which the sale has put him to; such as expenses for carriages, the duties for entry, or others of the like nature.<sup>f</sup>

## VII.

403. *Damages, if the Seller knows the Defects.*—If the seller knew the defects of the thing sold, he shall be bound, not only in damages according to the foregoing rule, but he will further be accountable for the consequences which the defect of the thing may have occasioned. Thus, he who had sold a flock of sheep, which he knew to be infected with a contagious distemper, without declaring it, would be bound to make up the loss of the other sheep belonging to the buyer which had been infected with this contagious distemper. And it would be the same thing, if the seller was obliged to know the defects of the thing sold, although he pretended to be ignorant of them; as if an architect who furnishes materials for a building had made use of such as were not sound and in good condition, he would be accountable for the damage that should ensue thereupon.<sup>g</sup>

## VIII.

404. *All Things restored to the same Condition by the Redhibition.*—If the defect of the thing sold gives occasion to the redhibition and dissolution of the sale, the seller and buyer shall be restored to the same condition as if there had been no sale at all. The seller shall restore the price, with the interest of it, and shall reimburse the buyer for whatever he has laid out for the preservation of the thing sold, and for the other consequences of the sale, according to the foregoing rules. And the buyer shall restore the thing to the seller, together with all the profit which he has reaped

<sup>f</sup> L. 1, § 1, *D. de edil. ed.*; — l. 23, §§ 1 et 7, *cod.*; — l. 27, *cod.*; — d. l. 27, *in fine*. See the following article.

<sup>g</sup> L. 12, *D. de act. empt. et vend.*; — l. 1, *C. de edil. act.*; — l. 45, *D. de contr. empt.*; — l. 2, § 5, *D. loc.* See the second article of the eighth section of *Hiring and Letting to Hire*



from it. And, in a word, all things shall be reciprocally restored on both sides to the same condition they were in before the sale.<sup>1</sup>

## IX.

405. *Change of the Thing before the Redhibition.*—All the changes which happen to the thing sold, after the sale, and before the redhibition, whether the thing perishes, or is diminished, without the fault of the buyer, and of the persons for whom he is answerable, affect the seller, who is bound to take back the thing; and he likewise reaps the profit of the changes which make the thing better.<sup>1</sup>

## X.

406. *If the Defects are evident, or declared by the Seller.*—If the defects of the thing sold are evident, as if a horse has his eyes put out, the buyer cannot complain of these sorts of defects, which, being visible, he could not be ignorant of;<sup>1</sup> no more than of those defects which the seller told him of.<sup>2</sup>

## XI.

407. *If the Defects may be known or presumed.*—If the defects of the thing sold are such as the buyer might have easily known, and been certain of; as if a field is subject to be overflowed; if a house is old; if the beams of it are rotten; if it is ill built; the buyer cannot complain of these sorts of defects, nor of others of the like nature. For the thing is sold to him such as he sees it.<sup>3</sup>

## XII.

408. *If the Seller has declared that the Thing has some Quality which renders it better.*—If the seller has declared the thing sold to have some other quality besides those which he is bound to warrant naturally, and that quality happens to be wanting, or even if the thing sold happens to have the contrary defects, we ought to judge of the effect of this declaration of the seller by

<sup>1</sup> L. 1, § 1, D. de edil. ed.;—l. 23, § 1, cod.;—l. 60, cod.;—d. l. 23, § 7. See the following article.

<sup>2</sup> L. 33, § 3, D. de edil. ed.;—l. 31, § 6, cod.;—d. l. 31, § 11;—l. 10, D. de rep. fur.

<sup>3</sup> L. 43, § 1, D. de contr. empt.;—l. 1, § 6, D. de edil. ed.;—l. 14, § ult. cod.

<sup>4</sup> D. l. 14, § 9.

<sup>5</sup> L. 1, § 6, D. de edil. ed.;—l. 14, § ult. cod.

the circumstances of the consequence of the qualities which he has expressed, of the knowledge which he might or ought to have of the truth, contrary to what he has said, of the manner in which he engaged the buyer; and, above all, it is necessary to consider if these qualities have made a condition without which the sale would not have been concluded. And according to the circumstances, either the sale shall be dissolved, or the price diminished; and the seller shall be bound in damages, if there is ground for it. Thus, for example, if the seller of an estate has declared it to be allodial, and has sold it as such, and this estate happens to be subject to a quitrent, and the buyer is obliged to pay a fine of alienation; the seller shall be bound to indemnify the purchaser from these charges, and the other consequences, according to the circumstances, even although he had been ignorant that the lands were subject to this quitrent. But if the seller has only made use of those expressions which are usual to sellers, who praise at random their goods which they have a mind to sell, the buyer, who ought not to have taken his measures upon expressions of that kind, cannot procure the sale to be dissolved upon any such pretext.\*

### XIII.

409. *An Estate sold such as it is.*—If an estate in land is sold such as it is, or in the same condition as the seller has fairly enjoyed it, or with its rights and conditions; these expressions, and others of the like nature, are no hindrance why the seller should not remain obliged to warrant the lands against hidden services, and all unknown charges; such as a ground-rent to which the land should be found to be liable.<sup>b</sup>

### \*XIV.

410. *Defect in Expression by the Seller.*—The seller is obliged to explain clearly and distinctly which is the thing that is sold, in what it consists, its qualities, its defects, and every thing that may give occasion to any error, or mistake. And if there is in his

\* L. 18, D. de edil. ed.; — l. 21, §§ 1 et 2, D. de act. empt. et vend.; — l. 19, cod.; — d. l. 19, cod.; — d. l. § 3; — l. 43, cod.; — v. l. 16, D. de hered. vel act. vend.; — l. 13, § 3, D. de act. empt. See the twelfth and fourteenth articles of the third section of *Covenants*, and the second article of the third section of the *Tices of Covenants*.

<sup>b</sup> L. ult. § ult. D. de contr. empt.; — v. l. 69, § 5, D. de exict.; — l. 61, D. de edil. ed. See the following article.

words any ambiguity, obscurity, or other defect, they are to be interpreted against him.<sup>a</sup>

## XV.

411. *Deceit in the Thing.*—He who has sold one thing for another; an old thing for a new; a less quantity than what he mentioned; whether he was ignorant of the defect or conscious of it, is bound to take back the thing, or to abate of the price, and to make good the damages which the buyer shall have suffered.<sup>r</sup>

## XVI.

412. *Redhibition because of the Defect of one of many Things which sort with one another.*—If of several things which match one another, such as the pieces of a suit of hangings, horses belonging to one and the same set, and other things of the like nature, one of them happens to have the defects which are sufficient to dissolve the sale, it shall be dissolved for the whole. For it is equally the interest both of seller and buyer not to unmatch these kinds of things.<sup>s</sup>

## XVII.

413. *Redhibition does not take Place in Sales which are made by Order of Court.*—Redhibition and diminution of the price, because of the defects of the thing sold, do not take place in public sales, which are made by a decree of a court of justice. For in these sales it is not the proprietor who sells, but it is the authority of justice, which is in the place of the seller, and which adjudges the thing only such as it is.<sup>t</sup>

## XVIII.

414. *The Time for bringing an Action of Redhibition.*—The time which the buyer is allowed for bringing his action of redhibition commences only after that the buyer has been able to discover the defects of the thing sold; unless this time were regulated by some custom, or that it has been agreed that the buyer should

<sup>a</sup> L. 39, *D. de pact.*; — l. 21, l. 33, *D. de contr. empt.* See the thirteenth article of the second section of *Covenants*, and the tenth article of the third section of *Hiring and Letting to Hire*.

<sup>r</sup> L. 45, *D. de contr. empt.*; — l. 21, § 2, *D. de act. empt. et vend.*; — l. 69, § ult. *D. de evict.*

<sup>s</sup> L. 38, § ult. *D. de edil. ed.*; — l. 34, l. 35, *cod.*

<sup>t</sup> L. 1, § 3, *D. de edil. ed.* Although this law has no direct relation to this article, yet it may be applied to it.

not bring his complaint, except within a certain time. But even in the case of a delay, that is regulated, the buyer may be received to make his complaint after that time is expired, and the judge will decide in the matter according to the circumstances.\*

## SECTION XII.

### OF OTHER CAUSES OF THE DISSOLUTION OF SALES.

415. *Divers Causes of the Dissolution of Sales.*—Sales may be dissolved for several causes;—by the seller's failing to deliver the thing sold;—by the buyer's failing to pay the price;—on account of the defects of the thing sold;—on account of the lowness of the price;—because of eviction;—because of the event of a condition;—by the revocation which the creditors of sellers make of sales made to defraud their creditors;—by the power of redemption vested in the heir of line, which dissolves the sale with respect to the buyer, and transfers it to the lineal heir, who is substituted in the place of the buyer;—by the power of redemption which lords have in regard to their feudal lands, and others;—by a power of redemption stipulated by covenant;—by virtue of a conditional agreement to dissolve the sale in case of a certain event;—by reason of the non-performance of some of the covenants stipulated in the sale;—by the mutual consent of seller and buyer;—by reason of fraud, force, error, and the other grounds of restitution, rescission, or nullity.

416. Of all these causes, the first six, and the last, which is that of nullity, have been explained under this title. The revocation of sales made to defraud creditors comes under the title of *That which is done to defraud Creditors*. The power of redemption vested in the heir of line, and that which attends feudal lands, do not come properly within the design of this work; for they are peculiar to our customs, and the power of redemption belonging to the heirs of line is abolished by the Roman law;† rescissions and restitutions shall have their respective titles in their proper places. And there remains only to be explained here, the power of redemption stipulated by covenant, the conditional agreement to dissolve the

\* L. 31, § 22, *D. de æd. ed.* See the eighth article of the fourth section, and the ninth article of the twelfth section.

† L. 14, *Cod. de contr. empt.*; — §. l. 16, *D. de reb. auct. jud. possid.*

sale in case of a certain event, the non-performance of the covenants, and the consent of buyer and seller. But we must, in the first place, explain some rules that are common to all the ways of dissolving sales.

## RULES COMMON TO THE DISSOLUTION OF SALES.

### ART. I.

417. *Difference between the Nullity and Dissolution of a Sale.*— There is this difference between the dissolution and nullity of a sale, that the nullity makes it to have been no sale from the beginning;<sup>a</sup> and the dissolution makes the sale to cease which had been accomplished; but does not make it never to have been, even although it should be dissolved by the will of the seller and buyer.<sup>b</sup>

### II.

418. *The Possessor cannot be turned out of Possession, but by the Authority of Justice.*— Whatever be the cause of the dissolution of a sale, if it is controverted, and the buyer, or any other person having his right, is in possession, the seller cannot take back the thing sold but by the authority of justice.<sup>c</sup>

### III.

419. *Damages, if there is Ground for any.*— If the sale is vacated by the act of one or the other of the parties, who has been the occasion of some damage, he shall be bound to make it good, pursuant to the rules which have been explained in this title.<sup>d</sup>

### IV.

420. *The Dissolution of the Sale restores all Things as they were.*— The sale being dissolved, the seller and buyer are reinstated in their rights; and all things are restored to the same condition they were in before the sale, as far as the circumstances will allow.<sup>e</sup>

<sup>a</sup> See the first article of the fifth section of *Covenants*.

<sup>b</sup> *L. 58, D. de pact.*; — *l. 1, C. quando lic. ab empt. disc.*; — *l. 2, cod.*; — *l. 2, in f. D. de resc. vend.* See on this and the following articles the sixth section of *Covenants*.

<sup>c</sup> See the sixteenth article of the fifth section, and the fifteenth article of the sixth section of *Covenants*.

<sup>d</sup> This is a consequence of several rules which have been explained in this title.

<sup>e</sup> *L. 33, § 1. D. de. util. ed.*; — *d. l. § 7.* See the following article.

## V.

421. *The Seller is reinstated in his Right.*—When the sale is annulled, the seller takes back that which he has sold, without any of the charges which the buyer may have burdened it with; because the seller is reinstated in his right, as if he had never been divested of it.<sup>1</sup>

## OF THE POWER OF REDEMPTION BY COVENANT.

## VI.

422. *Power of Redemption by Covenant.*—The power of redemption by covenant is a paction, by which it is agreed that the seller shall have the liberty to take back the thing sold, he restoring the price to the buyer, or so much of it as has been paid.<sup>2</sup>

## VII.

423. *A Sale with the Power of Redemption implies a Condition.*—A sale with the power of redemption implies a condition, that the sale shall be void, if the seller buys the thing back again.<sup>3</sup> And when he does so, he enters again into his right by virtue of that condition. Thus, he takes back the thing free from the charges to which the buyer may have subjected it.

## VIII.

424. *The Power of Redemption granted some Time after the*

<sup>1</sup> L. 60, D. de ord. ed. This rule is understood only of the charges to which the buyer had subjected the thing by his own proper deeds, as if he had subjected the lands he had bought to a quitrent, to a service, or if he had mortgaged them to his creditors; and it does not concern the fine of alienation which belongs to the lord of the manor on account of the sale. For this charge of paying the fine of alienation was a consequence of the contract, which was as much the act of the seller as of the buyer. So that the estate which was sold remains burdened with it, if the buyer did not pay it. But if the sale was annulled for a cause which proceeded solely from the act of the seller, as if his creditors seized upon the lands which were sold, it is just in this case that the buyer be indemnified by the seller as to the fine of alienation which he has paid. There are even some customs which give him the fine of alienation in the case of estates sold by a decree of the court, leaving the lord at liberty to take the same, he restoring to the purchaser the first fine of alienation he had received of him.

<sup>2</sup> See upon this article the fourteenth and fifteenth articles which follow. See the second article of the first section, and the tenth article of the second section, with the remarks made thereon.

<sup>3</sup> L. 2, C. de pact. int. empt. et vend. compt.; — l. 7, eodem; — l. 12, D. de praeac. verb.; — l. 1, C. quando decr. non est op.

<sup>4</sup> L. 7, G. de pact. int. empt. et vend. comp.; — l. 2, eod.

*Contract is past.* — If the power of redemption was granted only after the contract of sale was finished, it will be of no manner of prejudice to the charges and mortgages to which the buyer may have subjected the thing after the contract was past, and before he granted the power of redemption.<sup>1</sup>

## IX.

425. *The Continuance of the Power of Redemption.* — The power of redemption may be granted, either indefinitely, without marking the time within which the seller may redeem, or fixing a certain time, after which this power of redemption shall cease.<sup>1</sup> If the power is granted indefinitely, it lasts as long as the time limited for prescription.<sup>2</sup> If it is restrained to a certain time, the seller is not immediately excluded when the time expires; but a delay is granted to him in the same manner as to the buyer, when the sale ought to be dissolved for want of payment at the term.<sup>3</sup>

## X.

426. *The Fruits after an Offer made to redeem.* — The seller exercising his power of redemption of lands which he had sold, the purchaser ought to restore to him the fruits from the day that he made his demand, with a tender of the price in due form.<sup>4</sup>

## OF THE CONDITIONAL AGREEMENT TO DISSOLVE THE SALE, AND OF NON-PERFORMANCE.

## XI.

427. *Conditional Agreement to dissolve the Sale.* — The paction, or conditional agreement to dissolve the sale, is that covenant which is so usual in sales, that if the buyer does not pay the price at the time fixed, the sale shall be void.<sup>5</sup> And this same penalty of the dissolution of the sale may be likewise stipulated

<sup>1</sup> This is a necessary consequence of the accomplishment of the sale, which was pure, and without condition, and which had transferred the right to the buyer, pursuant to the rules of the nature of the contract of sale.

<sup>2</sup> *L. 2, C. de pact. inter empt. et vend. comp.*

<sup>3</sup> *L. 3, C. de prescr. 30 vel 40 ann.*

<sup>4</sup> See the eighteenth article of the foregoing section, the eighth article of the third section, and the thirteenth article of this section.

<sup>5</sup> *L. 2, C. de pact. inter empt. et vend. comp.*

<sup>6</sup> *L. 2, D. de leg. commiss.*

in case of the non-performance of the other covenant that is part of the contract of sale; as if it is said, that, if a house which is sold, and declared to be free from a service, shall appear to be subject to it, the seller shall be bound to take it back again.

## XII.

428. *Effect of these conditional Dissolutions.*—The clauses for dissolving the sale, in case of non-payment at the time appointed, or of non-performance of any other article of the contract, have not the effect immediately to dissolve the sale, upon the failure of performance; but a delay is granted for fulfilling what has been promised, unless the thing cannot admit of a delay; as if the seller fails to deliver the goods which he promised to have ready against the day of an embarkation.<sup>1</sup>

## XIII.

429. *The Sale vacated, although there be no Clause of Dissolution.*—Although there be no clause of dissolution for non-payment at the set time, or non-performance of any other article of the contract, yet the sale shall nevertheless be dissolved, if the failure of payment and the non-performance give occasion for it, after the delays, according to the circumstances.\* For the parties do not intend that the contract should subsist, unless each of them performs his engagement.<sup>2</sup>

OF THE DISSOLUTION OF THE SALE BY THE MUTUAL CONSENT  
OF THE SELLER AND BUYER.

## XIV.

430. *Dissolution of the Sale by Consent before Performance of Articles.*—If the seller and buyer dissolve the sale, before the thing sold has been delivered and the price paid, the sale not being as yet consummated, and all things being entire, both parties are discharged from their engagements; and are by mutual consent restored to the same state as if there had been no sale.<sup>3</sup>

<sup>1</sup> See the eighth article of the third section, and the nineteenth article of the second section.

<sup>2</sup> See the second and fourth articles of the third section of *Covenants*. L. 6, C. de pact. int. empt. et vend. compos.

<sup>3</sup> See the fifth article of the first section of *Covenants*.

<sup>4</sup> L. 2, D. de resc. vend.; — § ult. Inst. quibus modis tollitur oblig.; — L. 58, D. de pact.; —



## XV.

**431. Dissolution of the Sale by Consent, after Performances of Articles.**—If, the sale being consummated, the price paid, the thing delivered, and the buyer in possession, the seller and buyer agree afterwards to dissolve the contract, without any other cause than their bare will; it is not so much a dissolution of this sale, as a second sale which the buyer makes to the person who had sold the thing to him. Thus, this first seller does not take back a thing that is his own, since his sale of it had divested him of his right to it; but he buys, in effect, the thing belonging to another person; and it goes to him burdened with the charges and mortgages to which the person who bought the thing of him, and sells it back to him again, may have subjected it in the mean while.\*

## SECTION XIII.

OF SOME MATTERS WHICH HAVE RELATION TO THE CONTRACT OF SALE.

## OF FORCED SALES.

**432. Causes of Forced Sales.**—It happens very often that things which belong to particular persons are found to be necessary for some public use; and if in these cases they refuse to sell them, they are forced to it by the authority of justice. Because that,

*l. 7, § 6, cod.; — l. 1 et 2, C. quando licet ab empt. discedere.* See the following article, and the second article of the first section, and the tenth article of the second section.

It is necessary to observe on this article, that if the contractors dissolve the sale of lands, within a short time after the contract, and before the purchaser has taken possession of them, it is but equitable, and likewise agreeable to custom, that there should be no fine of alienation due on account of the said sale. And there are some customs which give a certain time, such as the space of eight days, for dissolving the contract, before any fine of alienation be due. But seeing this time is not regulated in the other provinces, and that a distinction may be made between the condition of a purchaser who has taken possession, and of one who has not, there arise frequently different questions, whether the fine of alienation be due or not, according to the state that things are in at the time of the dissolution of the sale. And it were to be wished that there were a certain and uniform rule for all these cases; and likewise for the other cases where such rules are wanting, as we have taken notice of in several places.

\* *L. 1, C. quando licet ab empt. disc.; — l. 2, D. de res. vend.* See the preceding article, and the remark that is there made on it, and the second article of the first section, and the tenth article of the second section.

all things being made for the use of the society, before any thing passes to the use of particular persons, they possess them only upon this condition, that their private interest shall give way to the public interest, in the necessities which may require it. Thus, a private man is bound to sell his lands, or tenements, if they be found necessary for some public work. And there are also other causes for which the public justice obliges persons to sell their possessions, and that even for the interest of private persons, as in the case of the fourth article of this section. We may observe in the Roman law, concerning the subject of forced sales, some singular cases where the proprietors were forced to sell. Thus, by a constitution of the Emperor Antoninus, masters who used their slaves ill were obliged to sell them.<sup>a</sup> Thus, when one of several masters of a slave, who belonged in common to many, was willing to give him his liberty, the other masters were forced to sell him their portions.<sup>b</sup> Thus, when a thing belonged in common to the exchequer and to private persons, the exchequer might of itself sell the whole thing, although the share it had in it were never so small, and the other proprietors were obliged to part with their shares to the purchaser, for their proportionable part of the price agreed on.<sup>c</sup>

## ART. I.

433. *Forced Sales.* — Forced sales are those to which persons are compelled by authority of justice, for the public good, or some other just cause.<sup>a</sup>

## II.

434. *A Forced Sale for the Public Good.* — If a house, or other tenement, appears to be necessary for a public use; such as the building of a parish church or enlarging it, to make a church-yard, for making a street or enlarging it, for making any fortification or other work for the public conveniency; the proprietor is compelled by public authority to sell the said house, or tenement, at a reasonable price.<sup>b</sup>

<sup>a</sup> V. § 2, *Inst. de his qui sui vel al. jur. sunt.*

<sup>b</sup> L. 1, § 1, *C. de comm. serv. man.*; — l. 16, *D. de sen. Silan.*

<sup>c</sup> L. ult. *C. de vend. rer. fac. cum priv. comm.*; — l. 2, *C. de com. rer. alien.*

<sup>a</sup> See the following articles.

<sup>b</sup> This is a consequence of what has been remarked in the beginning of this section. *FF. ff. D. de evict. in certo, Possessiones ex precepto principali distractas.* Ordinance of Philip the Fair, of the year 1303.

See an example of the use of a ground belonging to a private man, for the public con-

## III.

435. *Sale of Provisions.* — In the case of a public necessity, and at a time when there is a great scarcity of corn, such persons as have great plenty of it by them are compelled to sell it at a reasonable price.<sup>a</sup> And the civil policy obliges butchers and bakers to sell their goods likewise at a reasonable rate.<sup>d</sup>

## IV.

436. *A Forced Sale for a Particular Necessity.* — If the situation of two fields happen to be such, that there is no going to the one without passing through the other, the proprietor of the field through which it is necessary to pass is obliged to sell this service in the place which will be the least inconvenient for him.<sup>e</sup> For it is not reasonable that the other field should remain altogether useless.

## V.

437. *If the Person who might be compelled consents to the Sale.* — If, in the case where the proprietor of a field may be forced to sell it, he consents voluntarily to the sale, this will be a covenant, of which the conditions will be such as the parties shall have regulated them by common consent in the contract.<sup>f</sup>

## VI.

438. *If he refuses to sell.* — If the proprietor refuses to sell, and suffers himself to be forced to it by a court of justice, the sentence or decree which shall be pronounced against him shall be in the place of a sale, and of a title of alienation, which shall divest this proprietor of his right, and transfer the land or tenement to the use for which it is destined.<sup>g</sup>

venience, and for the wants of particular persons, in the thirteenth law, § 1, *D. de com. pred. tam urban. quam rustic.*, where it is said that a private man who has a quarry in his ground is not obliged to sell the stone he digs out of it, unless he be bound by a custom to give stone out of his quarry at a certain price to those who demand it. But if it were in a place where the use of this quarry were necessary to the public, would it not be just to oblige the proprietor to give the stone at a reasonable price, although no such usage were established?

<sup>a</sup> L. 2, *D. de leg. Jul. de ann.*; — L. 6, *D. de extraord. crim.*

<sup>d</sup> L. 1, § 11, *D. de off. pref. urb.* There are several ordinances on this subject.

<sup>e</sup> L. 12, *D. de relig.*

<sup>f</sup> It will be a voluntary agreement that regulates the conditions of this sale. See the seventh article of the second section of *Covenants*.

<sup>g</sup> This is a necessary consequence of these kinds of sales.

## VII.

**439. Effect of these Kinds of Sales.**—In the cases where the proprietor is divested of his land or tenement for some public use, he cannot be obliged to any warranty. For, besides that he is divested of it against his will, the land or tenement being put out of commerce by this change, it is not any longer subject to mortgages, nor to evictions. But the purchasers, such as churchwardens, or the corporation of a town, remain bound to the lord of the manor, for the rights which he had upon the said lands; and they are to indemnify him as to the consequences of this change, according to the quality of his rights, and the customs of the places. And the creditors of the person who is divested of his land, or tenement, have their right upon the price.<sup>1</sup>

## VIII.

**440. Fields lying near to the Highway.**—If by any accident, such as a flood, a highway is taken off, or rendered impracticable, the proprietors of the adjacent fields are bound to furnish a highway, but without having power to sell what they lose by that means<sup>1</sup>. For it is a casualty which turns their fields, or a part of them, into a highway; and this situation of their lands engaged them to suffer this event.

## OF SALES BY DECREE OF A COURT OF JUSTICE.

## IX.

**441. Distresses and Sales by Decree of a Court of Justice.**—Creditors have a right to demand that the goods of their debtors be exposed to sale; and these sorts of sales are forced, and are made by a decree of a court of justice.<sup>1</sup>

## OF SALE BY CANT OR AUCTION.

## X.

**442. Sale by Cant or Auction.**—When a thing, which cannot

<sup>1</sup> These are likewise necessary consequences of these kinds of sales.

<sup>1</sup> L. 14, in f. D. quemadm. serv. amitt. This rule is to be understood of an ancient highway. But if for the public conveniency a way were changed, to make it shorter, or to make a way altogether new, it would be necessary to indemnify the particular persons for the share of their grounds that goes to the making of this new way.

<sup>1</sup> See the ninth article of the third section of *Mortgages*.

I do not enter here into a particular discussion of this matter of sales by decree; which

be divided without great difficulty, such as a house, or which cannot be divided at all, such as a judicial office, belongs in common to several persons, and they either cannot, or will not, agree among themselves about it; they sell it, in order to divide the price of it among them; and they give it to the highest bidder, either among themselves, or strangers, whom they admit to bid for it. And this way of sale is called *cant*, or *auktion*.<sup>a</sup>

## OF VALUATION.

### XI.

443. *Valuation*. — It often happens that, many things having been sold by the lump together, for one sum, without distinguishing the price of each, it becomes necessary afterwards to know the price of each particular; and to regulate how much every one of the things may be worth upon the foot of the price that was given for the whole. And this way of making an estimate is what is called valuation. Thus, for example, if one of several lands that were sold for one and the same price happens to be subject to a fine of alienation, it is by a valuation that this fine is regulated. And it would be the same thing, if it were necessary to make a particular estimate of a portion of a house, or other estate.<sup>a</sup>

## TITLE III.

### OF EXCHANGE.

444. *Exchange being more ancient than Sale, why placed after it*. — *Exchange the first Commerce for acquiring the Property of Things*. — Although the use of exchange did naturally precede that of sale,<sup>a</sup> which had its beginning only with the invention of coin;

being a part of the order of judicial proceedings, and being different in our practice from what it was among the Romans, it does not properly belong to this collection. *F. l. ult. C. de jure doct.*

<sup>a</sup> *F. l. 78, § 4, D. de jur. dot. in verbo, Adjudicatusque fundus socio fuerit; et de verbo, Licitatione, — l. 13, § 17, D. de act. empt. et vend.; — l. 7, § 13, D. comm. dist.; — l. 2, C. eod.*

<sup>a</sup> *F. l. 1, D. de evict.; — l. 72, eod.*

<sup>a</sup> *L. 1, D. de cens. dist.*

yet order did require that we should explain the rules of the contract of sale before we should say any thing of exchange, for the reasons which have been remarked at the end of the plan of the matters treated of in this book. Exchange has been the first commerce which men made use of to acquire the property of things; the one party giving to the other what was either useless, or less necessary to himself, that he might get from the other a thing which he stood in need of.<sup>b</sup>

445. *Particular Rules of the Roman Law as to Exchange.* — Although the use of exchange be wholly natural, yet this contract had, in the Roman law, rules which seem not to be very natural in our practice. For exchange was considered in the Roman law as a contract without form, which was placed among those contracts which have no particular name; the effect of which was, that, when there was only a simple contract of exchange, without delivery on one side or the other, it produced no right to demand the execution of the contract;<sup>c</sup> and when delivery was made only by one party, he who had made, it had no right to demand that which the other party was bound to give him in counterchange, and he could only take back the thing which he had given.<sup>d</sup> But since it is natural, and agreeable to our practice, that all covenants should be performed,<sup>e</sup> we give to this contract its entire perfection. And the parties who have bound themselves in the contract are compelled mutually to execute it in the same manner as in the contract of sale; and as they were likewise compelled in the Roman law, when the exchange was attended with a stipulation.<sup>f</sup>

446. *The Rules of Sales serve for Exchange.* — *Exception.* — All the matters relating to exchange being almost the same with those belonging to the contract of sale, because of the affinity between these two contracts, we shall repeat nothing here of what has been said of the contract of sale; it being sufficient to advertise the reader, that we may apply to the contract of exchange all the rules of sales, except those which have no relation to it; such as the rules concerning the price; because in exchange there is no price. Thus, the rules touching the engagement of the buyer to pay the

<sup>b</sup> L. 1, D. de contr. empt.

<sup>c</sup> L. 3, C. de rer. perm.; — L. 1, § 2. D. de rer. perm.

<sup>d</sup> L. 1, § ult. D. de rer. perm.; — L. 5, l. 7, C. cod.

<sup>e</sup> L. 1, D. de pact.

<sup>f</sup> L. 3, C. de rer. perm.; — l. 33, C. de trans

price, those relating to the power of redemption, and others of the like nature, are not applicable to exchange. But the rules touching delivery, those concerning warranty, with the other engagements of the seller, those relating to the changes of the thing sold, the nullities of sales, eviction, redhibition, and others of the same kind, are rules common to sales and to exchanges. So that it will suffice to set down here, as rules peculiar to exchange, those which follow.<sup>g</sup>

### ARTICLE I.

447. *Definition of Exchange.* — Exchange is a covenant, by which the contractors give to one another one thing for another,<sup>a</sup> whatever it be, except money; for in that case it would be a sale.<sup>b</sup>

### II.

448. *In Exchange, both the one and the other hold the Place of Seller and Buyer.* — In the contract of exchange, the condition of the contractors being equal, in so much as both the one and the other give one thing for another, we cannot in it make a distinction of a seller and a buyer, no more than of a price and a merchandise.<sup>c</sup> But both one and the other hold the place at the same time, both of seller of the thing which he gives, and of buyer of that which he receives.<sup>d</sup>

### III.

449. *Eviction in Exchange.* — If he who has taken a thing in exchange is evicted of it, he holds the place of buyer, and has his recourse for warranty; and the other is bound to indemnify him against the eviction in the same manner as a seller is.<sup>e</sup>

### IV.

450. *Rules of Exchange the same with those of Sale.* — All the rules of the contract of sale take place in exchange, except those which appear not to be of the nature of this contract, such as the rules concerning the payment of the price.<sup>f</sup>

<sup>g</sup> L. ult. D. de rer. perm.; — l. 2, C. de rer. perm.

<sup>a</sup> L. 2, § 1, D. de contr. empt.

<sup>b</sup> L. 5, § 1, D. de pragc. verb.

<sup>c</sup> L. 1, § 1, in f. D. de contr. empt.; — l. 1, D. de rer. perm.; — l. 1, in princ. de contr. empt.

<sup>d</sup> L. 19, § 5, D. de acq. ed.; — l. ult. D. quib. ex caus. in posses. acq.

<sup>e</sup> L. 1, D. de rer. perm.; — l. 1, C. cod.

<sup>f</sup> L. 2, C. de rer. perm.; — l. 2, D. cod.

## TITLE IV.

## OF HIRING, AND LETTING TO HIRE, AND OF THE SEVERAL KINDS OF LEASES.

**451. *The Matters of this Title.***—This title contains the commerce used among men, for communicating to one another the use of things, or of their industry and labor, for a certain price. This covenant is of a most necessary and most frequent use. For, since it is not possible that all men should have in their own property all the things which they stand in need of, nor that every one should do that himself which cannot be had without industry and without labor; and that it would not be just that the use of the things of others, or of their industry and labor, should be always gratuitous; it has, therefore, been found necessary to make a traffic of all these things. Thus, he who has a house which he does not inhabit himself, gives the use of it to another for a certain rent. Thus, people hire horses, coaches, hangings, and other movables. Thus, lands are farmed out to tenants; or laborers are hired to till them. Thus, people make a traffic of their industry and their labor, either by the great, or at the rate of so much a day, or by other bargains.

**452.** All these kinds of covenants have this in common, that in every one of them the one party enjoys the thing belonging to another, or uses his labor for a certain price: and it is for this reason that, in the Roman law, they are all of them comprised under the names of letting and hiring: letting on the side of one of the parties, who is called the *lessor*; and hiring on the side of the other party, who is called the *lessee*. And here it is necessary to remark, that whereas, in the letting of things, the lessor is he who gives the thing, and the lessee is he who takes it; in the letting of labor, the lessor is he who gives a work to be done, and the person who undertakes the work, and who gives his labor and industry, is called the undertaker.

**453.** It is to these several sorts of covenants that we give the general name of lease, such as the lease of a house, the lease of a farm, a lease of work to be done, either at the rate of so much for every day's work, or by the great; because in all these covenants the one party gives to the other, either a thing to be enjoyed, or a work to be done.



454. Although the name of letting and hiring be common in the Roman law to all these sorts of engagements, and we have comprehended under one and the same title, and without distinction, leases of houses, and movables, and farms, as also the undertaking of a building, or any other work, with the other covenants of this kind; yet we have thought it very proper to distinguish between the letting to hire a house, a horse, or any other thing, and the lease of a farm, and the undertaking of any piece of work at a price agreed on. For these matters are not only distinguished by their names, but they have likewise some differences in their nature, and in their rules. And because they have all of them some characters and some rules which are common to them all, we shall explain in the first section, under the name of letting and hiring in general, those characters which belong to them in common; and in the same section, and the two following, we shall likewise gather together many of those common rules; and in the following sections we shall explain what is particular in the leases of farms, and in the other kinds of leases.

455. All these matters shall be contained in nine sections, to which we have added a tenth, which treats of emphyteutical leases, or leases for perpetuity, which are of a different nature, and have different rules, from the usual leases of farms, by which the enjoyment of the lands is granted only for a certain time.

## SECTION I.

### OF THE NATURE OF LETTING AND HIRING.

#### ART. I.

456. *Definition of Letting and Hiring in general.* — Letting and hiring in general, including therein all kinds of leases and undertakings of any works, is a contract by which the one party gives to the other the enjoyment or use of a thing,<sup>a</sup> or of his labor,<sup>b</sup> during a limited time, for a certain rent or hire.<sup>c</sup>

<sup>a</sup> *Tot. tit. D. locat. cond.*; — § 2, *Inst. de locat. et cond.*

<sup>b</sup> *L. 22, § 1, D. locat.*

<sup>c</sup> *Inst. eod.*; — l. 2, *D. eod.* We do not comprehend under this definition the emphyteutical leases, or leases for perpetuity; because they have their peculiar nature, which shall be explained in the tenth section.

## II.

457. *Who is the Lessor, and who the Lessee.*—He who gives a thing to be enjoyed is called the *lessor*,<sup>d</sup> and the same name is given to him who gives out any piece of work to be done.<sup>e</sup> He who has the enjoyment of any thing by hiring it, or taking a lease of it, is called the *lessee*; <sup>f</sup>as also he who undertakes the doing of any work,<sup>g</sup> who is likewise called *undertaker*. But in the letting out of labor and industry, or in undertaking of any work by the great, or at the rate of so much a day, or so much a measure, the workmen or undertakers are likewise in some sense to be accounted lessors; for they let out and give their labor and industry.<sup>h</sup>

## III.

458. *Letting and Hiring is accomplished by the bare Consent.*—This contract is of the number of those which are accomplished by the bare consent, in the same manner as the contract of sale; and these two contracts have a great affinity one to the other, and many rules which are common to both.<sup>i</sup>

## IV.

459. *What Things may be let.*—We may let to hire all things which the hirer can restore back to the letter, after he has enjoyed them.<sup>j</sup> From whence it follows, that we cannot let to hire, no

<sup>d</sup> L. 9, § 2, *D. locat.*; — l. 19, § 2, *cod.*

<sup>e</sup> L. 8, *C. de locato.*

<sup>h</sup> L. 22, § 2, *D. loc.*

<sup>g</sup> L. 22, § 1, *D. locat.*; — l. 36, *cod.*

<sup>f</sup> L. 2, *C. de locato.*

<sup>i</sup> L. 1, *D. locat. cond.*; — l. 2, *D. cod.*; — *Inst. de loc. et cond.*; — §§ 1, 3, *Inst. cod.* The contract of hiring and letting is, as the contract of sale, accomplished by the bare consent, when the parties are agreed as to the thing that is to be given to be enjoyed, or the work that is to be done, and as to the rent or hire. And it is in this respect that this contract resembles the contract of sale, both the one and the other having a price and a merchandise; from whence it happens that, in some bargains, it is doubtful whether they be a letting and hiring or a sale. As, for instance, where one makes a bargain with a goldsmith that he shall do some piece of work, and shall furnish the silver as well as the fashion; — this bargain seems to belong to the contract of letting and hiring, although in effect it be a sale. Item queritur, si cum aurifice Titius convenerit, ut is ex auro suo certi ponderis, certæque formæ annulos ei faceret, et acciperet verbi gratiâ decem aureos; utrum emptio, an locatio et conductio contrahi videatur? Cassius ait, materiam quidem emptionem et venditionem contrahi, operæ autem locationem et conductionem. Sed placuit tantum emptionem et venditionem contrahi. § 4, *Inst. de locat. et cond.* As to the rules which belong in common to sale, and to the contract of letting and hiring, it is easy to judge of them by the bare reading of this and the foregoing title.

<sup>j</sup> This is a consequence of the definition of letting and hiring.

more than we can lend, so as to have back the thing lent in specie, such things as are consumed by the use of them; such as corn, wine, oil, and other provisions.<sup>m</sup>

## V.

460. *The Profits of Animals.*—Animals which produce any revenue or profit, such as sheep, which yield wool, lambs, and manure for lands, and other animals of the like kind, may be in a manner let to hire to one who undertakes to keep them, and to feed them, for a certain portion that is allotted him out of the profits that arise from the said animals, provided the agreement have nothing in it that is usurious, by reason of the excessive profit reserved to the owner.<sup>n</sup>

## VI.

461. *The Letting of a Thing which is not one's own.*—We may let, as well as sell, a thing which belongs to another person. Thus, he who possesses honestly a thing of which he believes himself to be the true owner, although he is not, and he who has a right to the use and profits of a thing, without being master of it, as the usufructuary, may let and farm out what they possess in this manner.<sup>o</sup>

## VII.

462. *The Rent, or Hire, in Money, or a Portion of the Fruits.*—The rent, or hire, of what is let out, may be regulated, either in money, as it is in sales, or in a certain quantity of provisions, or in a portion of the fruits.<sup>p</sup>

## VIII.

463. *The Lowness of the Rent not considered in Leases.*—The lowness of the rent is not considered in leases, as the lowness of the price is in sales, in order to vacate them; unless it were attended with other circumstances, such as fraud, or some error. For leases are not alienations, as sales are. And besides, the ap-

<sup>m</sup> L. 3, § ult. *D. commod.* See the sixth article of the first section of the *Loan of Things* to be restored in Specie.

<sup>n</sup> L. 8, *C. de pact.*

<sup>o</sup> L. 7, *D. loc.*; — l. 9, § 1, *D. cod.* See the twelfth article of the fourth section of the *Contract of Sale.*

<sup>p</sup> L. 21, *C. de locato*; — l. 25, § 6, *D. cod.*

certainty of the value of the profits for the time to come may justify the agreement between the proprietor and farmer, in fixing a rent certain, instead of that value which is uncertain.<sup>a</sup>

## IX.

464. *Liberty to let to others what we ourselves have a Lease of.* — He who has a lease of a house, or farm, may let it out to others, unless it has been otherwise agreed upon.<sup>b</sup>

## X.

465. *Leases go to Heirs or Executors.* — The engagements which are formed by the contract of letting and hiring pass to the heirs or executors of the lessor, and to those of the lessee.<sup>c</sup>

## SECTION II.

## OF THE ENGAGEMENTS OF THE LESSEE.

## ART. I.

466. *Engagements of the Lessee.* — The engagements of the person who takes any thing to hire are, to put the thing to no other use than that for which it is hired; to use it well; to take care of it; to restore it at the time appointed; to pay the rent or hire; and in general he ought to observe whatever is prescribed by the covenant, by law, and by custom.<sup>a</sup>

## II.

467. *How the Thing which is hired ought to be used.* — He who takes a thing to hire cannot put it to any other use than that for which it is given him, nor use it in any other manner than what is agreed upon: and if he does otherwise, he shall be bound to make

<sup>a</sup> L. 53, D. loc., — l. 52, D. cod. See the tenth article of the fifth section of *Covenants*, and the eleventh article of the eighth section of the *Contract of Sale*.

<sup>b</sup> L. 6, C. de loc.; — l. 60, D. cod.

<sup>c</sup> L. 19, § 8, D. loc.; — l. 10, l. 29, l. 34, C. cod.

[In the translation of this article, I have joined the word *executors* to that of *heirs*; because the law of England makes a distinction in leases, some of which descend to the heir, and some to the executor. Leases for life are of the nature of freeholds, and therefore descend to the heir. Leases for years are chattels, and go to the executor.]

<sup>a</sup> These engagements shall be explained in the articles which follow. See the first article of the third section of *Covenants*.

good the damage that follows thereupon. Thus, he who hires a horse to ride on cannot make use of him for a packhorse. Thus, the tenant of a house who is tied up by his lease not to make a fire, or not to put hay in a certain place, cannot do either of these things; and if he does, and there happens a fire, he shall be liable for damages, although the fire were occasioned only by some accident; for it is the tenant's fault that has given occasion to this accident.<sup>b</sup>

### III.

468. *Of him who misuses the Thing.*—He who has taken a thing to hire is obliged to use it well and carefully, as a good master would do, and neither to do, nor suffer any thing to be done, which may be of prejudice to the person who lets it out. Thus, the tenant of a house ought not to suffer the usurpation of a service which is not due. Thus, he who has hired beasts of burden ought not to load them excessively; and if he does it, or misuses in any other manner of way the thing hired, he shall be answerable for it.<sup>c</sup>

### IV.

469. *What Care he is obliged to, who has taken a Thing to hire.*—Seeing he who takes a thing to hire uses it for his own behoof, he ought to take care to keep it, and to preserve it: and he is accountable, not only for the damage which may happen through his knavery, or through any gross fault of his which comes near to it, but likewise for the damage which may be occasioned by other faults, which any careful and diligent man would not readily fall into. But if, without his fault, the thing perishes, or is damaged by some accident, he is not bound to make it good.<sup>d</sup>

### V.

470. *He who takes a Thing to hire is accountable for the Act of the Persons for whom he ought to answer.*—He who takes the thing to hire is bound, not only for his own act, but likewise for

<sup>b</sup> L. 11, § 1, D. loc.; — d. l. 11, § ult.; — r. l. 13, § 2, et l. 18, D. commod. See the tenth article of the second section of the *Loan of Things to be restored in Specie*.

<sup>c</sup> L. 11, § 2, D. loc.; — l. 30, § 2, D. cod.

<sup>d</sup> In iudicio tam locati, quam conducti dolum et custodiam, non etiam casum, qui assisti non potest, venire constat. L. 28, C. de loc.; — l. 9, § 4, D. cod.; — l. 22, D. de neg. jur.; — l. 5, § 2, D. commod.; — l. 1, § 10, D. depos. See the twenty-fourth article of the second section of the *Contract of Sale*.

the act of the person for whom he ought to be answerable. As if a tenant of a house has put in a tenant under him; or if he has kept servants in it, and they by their carelessness have set the house on fire.\*

## VI.

471. *Of the Damage done by an Enemy of the Person who has hired the Thing.*—If a tenant or farmer draw upon himself, by his own fault, any damage from some of his enemies; as if the said enemy, to be revenged of him for some bad treatment, sets the house on fire where the tenant lives, or cuts down the trees of the lands which the farmer occupies, he shall be accountable for the damages; for it is through his fault that these mischiefs do happen.†

## VII.

472. *Of the Lessee who quits Possession for Fear of some Danger.*—If a country farmer, or a tenant of a house which stands in

\* L. 11, *D. loc.*; — v. l. 27, § 9, *D. ad leg. Aquil.*; — l. 25, § 7, *cod.*; — l. 60, § 7, *cod.* See the fifth article of the fourth section of *Damages occasioned by Faults*, and the fifth article of the eighth section of this title.

It does not seem reasonable that the tenant should be discharged of the faults of his servants or under-tenants, although he were no way to blame for the choice of their persons. For, besides that the event shows that he has made a bad choice, he ought to answer for the act of those to whom he has given the use of the house which was intrusted only to him; and the act of those persons becomes his own with respect to the person who has let the house to him, and who treated only with him. To which case it may not be amiss to apply the words of the last law, *D. pro socio*. *Directo cum illius personâ agi posse, cujus persona in contrahendâ societate spectata sit.* And besides, either the under-tenant is able to pay the damage occasioned by the fire, in which case the chief tenant is at no loss, since he may recover it of the under-tenant; or he is insolvent, and in this case the chief tenant ought to be answerable for him; for he could not make the condition of the proprietor worse, who had chosen an able tenant to be answerable for his house.

† *Culpæ autem ipsius et illud adnumeratur, si propter inimicitias ejus vicinus arbores exciderit.* L. 25, § 4, *D. loc.*

It is in the sense explained in this article that we are to understand this law. That is, that the farmer and tenant ought not to be answerable for the damage done by an enemy, unless they have given occasion to it by their own fault. In relation to which we may take notice of the example mentioned in the sixty-sixth law, *D. solut. matr.*, of the loss of the goods and lands which Licinia, wife of Gracchus, brought him in marriage, which were lost by the sedition of her husband; which made it be decided that that loss should not fall upon the wife, but upon the estate of Gracchus. But if the tenant or farmer cannot be any ways blamed for any bad conduct in this matter, it would not be just to make him accountable for the consequences of an enmity for which he had given no manner of occasion; as, for instance, if the enmity proceeded from one's bearing witness to the truth in a court of judicature.

a lonely place, leave the house or farm, for fear of some danger, without acquainting the owner, in case they were able to do it, and if the quitting of the house or farm has been attended with some damage, it is to be judged by the circumstances of the danger, and of their conduct, whether they ought to be accountable for the rents and damages, or if they ought to be discharged of them.<sup>a</sup>

## VIII.

\* 473. *If the Tenant leaves his House, or the Farmer his Farm.*— If a tenant ceases, without cause, to inhabit the house which he has hired, or a farmer to cultivate the grounds which he has taken to farm, they may be sued before the term, both for the rent, and likewise for the damages which the owner sustains thereby.<sup>b</sup>

## IX.

474. *Repairs.*— If the tenant or farmer is obliged to any repairs, whether by the lease, or by the customs of the places, he will be compelled to make them, and be liable in damages to the lessor if he have not made them.<sup>c</sup>

## X.

475. *If the Tenant absconds.*— If the tenant of a house disappears without paying the rent, the owner may have recourse to justice, to get an order for opening the house, within the time that the judge shall appoint; and for making an inventory of the movables which shall be found in it, that out of them he may recover payment of his rent, and that the remainder may be secured for the tenant, or for such other persons as shall be found to have an interest in them.<sup>d</sup>

## XI.

476. *The Lease being out, he who hired the Thing ought to give it back, and pay the Rent, or Hire.*— After that the time for which the thing was let is expired, he who hired it ought to restore it to the person who let it to him, and to pay the rent or hire which was agreed upon, at the time appointed.<sup>e</sup>

<sup>a</sup> L. 28, C. de loc.; — l. 13, § 7, D. loc.; — l. 27, § 1, D. loc.; — l. 55, in f. loc. See the following article.

<sup>b</sup> L. 24, § 2, D. loc. See the preceding article.

<sup>c</sup> L. 56, D. loc.

<sup>d</sup> L. 24, § 3, D. loc.

<sup>e</sup> L. 25, C. de locat.; — l. 17, C. loc.

## XII.

477. *The Movables of the Lessee that are mortgaged for the Rent.* — The movables which the tenant brings into the house which he has hired are mortgaged for the payment of the rent of the house; and the fruits of the<sup>p</sup> ground are mortgaged for the payment of the rent of the farm;<sup>a</sup> according to the rules which shall be explained in the title of mortgages, and of the privileges of creditors.

## XIII.

478. *The Owner may turn out the Tenant, if he wants the House himself.* — If the owner of a house which is let happens to want it for his own use, he may oblige the tenant to restore it to him, within the time that shall be determined by the judge. For since the owner does not let his house, but only because he has no occasion for it himself, it is a tacit condition that, if he shall have occasion for it, the tenant shall be bound to deliver it up to him.<sup>o</sup> But the owner may renounce this right by the lease.<sup>p</sup>

## XIV.

479. *If the Owner wants to repair his House.* — The tenant is likewise obliged to quit the house, if the owner has a mind to repair it.<sup>a</sup> And if the repairs which he intends to make are necessary, as if it be to repair any part of the house that is like to fall, the owner will not be liable for any damages to the tenant; but only to discharge the tenant of the rent, or to restore it if it has been already paid; for it is an accident.<sup>r</sup> But if the repairs are not absolutely necessary, the owner will be bound to make good the damages which the tenant suffers by the interruption of his lease. Thus, if the chief tenant has let the house to under-tenants for a greater rent than what he is bound to pay by his lease, the owner is obliged to make this good to the tenant, and to secure him against the demands of the under-tenants for the interruption of their leases.<sup>s</sup> But if the repairs may be made in a

<sup>a</sup> L. 4, D. in quib. caus. pign. vel hyp. t. contr.; — l. 5, C. de loc.; — l. 7, D. in quib. caus. pign. v. hyp. t. contr.; — l. 3, C. eod.

See the twelfth, thirteenth, fourteenth, and following articles of the fifth section of *Mortgages*, and of the *Privileges of Creditors*.

<sup>o</sup> L. 3, C. h. t.

<sup>p</sup> L. 29, C. de pact.; — l. 41, D. de min. See the fourth article of the fourth section of *Covenants*.

<sup>r</sup> D. l. 3, C. de loc.

<sup>s</sup> L. 35, D. loc.; — l. 33, D. eod.

<sup>t</sup> L. 30, D. loc.; — l. 33, D. loc.



short time, with little trouble to the tenant, and without obliging him to remove, he ought to bear with this small inconvenience.<sup>1</sup>

## XV.

480. *The Tenant may be turned out for Non-payment of his Rent.* — If the tenant does not pay his rent, the proprietor may turn him out by the authority of justice, within the time that shall be prescribed by the judge to the tenant, either to pay or to remove.<sup>2</sup>

## XVI.

481. *The Tenant may be turned out, if he make a bad Use of the House.* — The tenant may likewise be turned out by authority of justice, if he makes a bad use of the house he has hired; as if he damages the house; if he exposes it to the hazard of being burned, by making fire in a place where he ought not; if he carries on any unlawful commerce in the house, or suffers others to do it; or if he makes a bad use of the house any other manner of way.<sup>3</sup>

## XVII.

482. *Interest of the Rent, or Hire.* — If the tenant who owes his rent, or he who gives out any work to be done, does not pay the rent, or hire, at the time appointed, he will be liable for the interest from the time of the demand.<sup>4</sup>

## SECTION III.

## OF THE ENGAGEMENTS OF THE LESSOR.

## ART. I.

483. *The Lessor is obliged to procure a free Enjoyment to the Lessee.* — The lessor is bound to procure the free use and enjoyment of the thing to the person to whom he lets it out; to deliver the thing to him in a condition to serve the use for which it is

<sup>1</sup> L. 27, D. loc.

<sup>2</sup> L. 3, C. de loc.; — l. 61, D. loc.; — v. l. 54, § 1, cod.

<sup>3</sup> D. l. 3, C. de loc.; — v. l. 11, § 1, D. cod.; — Nov. 14, c. 1.

<sup>4</sup> L. 17, C. de loc.; — l. 54 D. cod.

hired, and to keep it in this good condition, making the necessary repairs, which the tenant is not bound to make, neither by his lease, nor by the custom of the place. And if the lessor does not deliver the things in good condition, or such as he promised them, the lessee will recover his damages, and get the lease to be annulled, if there is ground for it; and he will be still more entitled to this relief, if the proprietor himself, or the persons for whom he is answerable, hinder the tenant from enjoying the thing.<sup>a</sup>

## II.

484. *Eviction.*—If the tenant is expelled by an eviction, the lessor is liable in damages for the interruption of the lease. For although this be a kind of casualty, yet the lessor is, notwithstanding, bound to procure a free and undisturbed possession of the thing to the tenant, and to put a stop to all claims made by any other person to the thing that is let, in the same manner as the seller is obliged to do with respect to the thing he sells.<sup>b</sup>

## III.

485. *The Tenant dispossessed by a Superior Force.*—If the tenant is turned out by the act of the prince, by a superior force, or by some other accident; or if the land or tenement is destroyed by an inundation, by an earthquake, or other event; the lessor, who was bound to give the land or tenement, cannot demand any rent for it, and will be obliged to restore so much of it as he has received; but without any other damages; for no man is to be accountable for accidents.<sup>c</sup>

## IV.

486. *Sale annuls the Lease.*—If the lessor sells a house, or any other estate, which he had let out, the lease is annulled by this change of the proprietor; and the purchaser may use and dispose of the thing as he pleases; unless the seller has obliged him to continue the lease. But if the purchaser turn the tenant out, the

<sup>a</sup> L. 15, § 1, *D. loc.*; — l. 25, § 2, *D. loc.*; — l. 15, § 8, *D. loc.* See the sixth article of the sixth section.

<sup>b</sup> L. 9, *D. loc.*; — v. l. 7, et l. 8, *cod.*

We have not set down in the article the exception made in this law, of the case where the lessor, or landlord, offers the tenant another lodging; because such an accommodation is hardly possible, unless it be by common consent. And we must leave it to the discretion of the judge, to consider what regard ought to be had to such offers.

<sup>c</sup> L. 26, *C. de loc.*; — l. 15, § 7, *D. loc.*; — l. 33, in *f. cod.*; — l. 23, *D. de reg. jur.*

lessor is bound for the damages which this interruption of the lease may have caused.<sup>d</sup>

## V.

487. *The Legatee may dissolve the Lease.* — If the lessor devises the house or lands which he has let out, and dies, the legatee is not obliged to continue the lease made by the testator; for he is a new proprietor, as is the buyer. But if the tenant is turned out by the legatee, he will recover his damages against the heir or executor, who is bound to make good the act of the deceased.<sup>e</sup>

## VI.

488. *If an Inconveniency happens unexpectedly.* — If a house that is let becomes too inconvenient, although without the act of the lessor; as if a neighbour, raising his building, darkens the lights; the lessor is bound to make good the damages of the tenant, who may, if he pleases, vacate the lease. For although this be an accident, yet the house being let for its use, in the condition it was in at the time of letting, whatever be the cause that makes it less useful, the damage ought to fall upon the lessor.<sup>f</sup>

## VII.

489. *Of the Expenses laid out by the Lessee.* — If the lessee finds himself under a necessity of being at some charge in preserving the thing he has hired; as if the tenant of a house has propped up that which was in danger of falling; or if he has been at any other necessary expense, which he was not bound to, either by his lease or by the custom of the place; the lessor is obliged to reimburse him.<sup>g</sup>

## VIII.

490. *Of the Defects of the Thing hired.* — If he who lets out a thing for some use gives it such, that by reason of some defect in it there happens some damage, he shall be answerable for it. Thus,

<sup>d</sup> L. 25, § 1, D. loc.; — L. 2, C. eod. See the remark on the following article.

<sup>e</sup> L. 32, D. loc. It is necessary to remark on this and the foregoing article, that the tenant who is expelled by the legatee or purchaser retains his mortgage for his debt on the estate which is sold or devised; and that he may bring his action for his mortgage against the possessors, to recover the damages he suffers by the interruption of the lease. And they will have their warranty, viz. the buyer from his seller, and the legatee from the executor.

<sup>f</sup> L. 25, § 2, D. loc.

<sup>g</sup> L. 53, § 1, D. loc.

for instance, if he who lets out vessels for holding of oil, wine, or other liquors, gives such vessels as are not in a good condition, he shall be liable for the loss or damage that happens on that account. For he who lets a thing for any use ought to know if it is proper for it, and to warrant that use for which he takes the hire. But if the defects of the things that are let are the bare effect of some casualty, which he who lets them could neither know nor presume to be in them, he shall not be answerable for the event of this accident; but only to give back the hire or rent. Thus, for example, if, in a pasture-ground which is farmed out, there happen to be herbs which destroy the farmer's cattle, the proprietor, who was ignorant of this defect, either because these herbs grew up of a sudden, or having some other just cause of his ignorance, will not be accountable for the loss of the said cattle, but he cannot demand any rent for the ground.<sup>b</sup>

## IX.

491. *A Lease from him who has the Use and Profits.*—If the lessor had only the use and profits of the thing let, and the lease is not limited to the time which the usufruct may last, his heir or executor will be liable for the damages occasioned by the interruption of the lease, when the usufruct expires.<sup>1</sup>

## X.

492. *If the Lessor expresses himself obscurely, his Words will be interpreted against him.*—The lessor is obliged to make known to the lessee wherein consists the thing which he lets, to declare its defects, and to explain every thing that may give occasion to any error or mistake. And if he has expressed himself in dark or ambiguous terms, his words will be interpreted against him.<sup>1</sup>

## SECTION IV.

## OF THE NATURE OF THE LEASES OF FARMS.

493. ALL that has been said in the first three sections is com-

<sup>1</sup> L. 19, § 1, *D. loc.*; — v. l. 45, § 1, *cod.* See the third article of the third section of the *Lease of Things to be restored in Specie.*

<sup>2</sup> L. 9, § 1, *D. loc.*; — d. § in f.

<sup>3</sup> L. 39, *D. de pact.*; — v. l. 21, l. 33, *D. de contr. empt.* See the thirteenth article of the second section of *Covenants*, and the fourteenth article of the eleventh section of the *Contract of Sale.*

tion to leases of farms, and ought to be applied to them, except some articles of which it is easy to judge that they have no relation to them. Thus, what has been said of the landlord's right to turn the tenant out of his house, if he has occasion for it himself, has no relation to a lease of lands. In the same manner it will be easy to judge of the other rules which ought, or ought not, to be applied to leases of farms. And it remains only to explain in this section, and the two following, what is singular in the nature of leases of farms, and in the engagements of the farmer, and those of the proprietor, that so we may pass on to the other matters of this title.

### ART. I.

494. *Definition of Leases of Farms, and of what Estates they are made.*—Leases of farms are contracts, by which lands are let out, which naturally produce fruits, whether by culture, as arable land, vineyards; or without culture, as a coppice, a fish-pond, pasture-ground. And this distinguishes the leases of these kinds of possessions from the leases of houses, and other buildings, which produce no manner of fruit; and which are let only for the convenience of dwelling in them, or for some other use.<sup>a</sup>

### II.

495. *What other Things may be farmed out.*—We may likewise let to farm the grounds which produce other kinds of revenues, as a quarry to dig stone out of, places out of which they dig gravel, potter's clay, coal, lime, and other matters; and, in general, every thing which is the product of a ground, or which may be digged out of it, may be farmed out.<sup>b</sup>

### III.

496. *The Same.*—We may likewise farm out a right of hunting and fishing, as also other revenues which do not proceed from the things themselves, and yet are the product of the grounds. Thus we farm out a right to gather a toll, the passage of a bridge, or of a ferry-boat, and other duties of the like kind.<sup>c</sup>

### IV.

497. *Difference between Leases of Houses and Farms.*—The

<sup>a</sup> L. 17, D. de verb. sign.; — l. 25, § 1, D. loc.

<sup>b</sup> L. 9, D. de usufr.; — l. 77, D. de verb. sign.; — l. 40, § 4, D. de contr. empt.

<sup>c</sup> L. 9, § 5, D. de usufr.; — l. 4, C. de rectig. et comm.

lease of a farm differs from the lease of a house, or other building, in that the tenant of a house knows certainly what it is he is to enjoy, and what benefit he will reap from the house, whether it be to dwell in it, or to put it to some other use for which he hires it; whereas the farmer is ignorant what the fruits of the ground, and the other revenues which he takes to farm, will justly amount to, because of the uncertainty of their being of greater or lesser quantity and value, and of the danger of a barrenness, and other accidents, which may diminish, or quite destroy, the revenue.<sup>d</sup>

V.

498. *The Effect of the Uncertainty of Events.* — This uncertainty of the events, which may diminish the revenues which are farmed out, or quite destroy them, as likewise of those which may augment them, makes the parties, in their contracts about farms, to treat with the view of this hope and of this danger. And it is for this reason that they may covenant that the farmer shall not pretend any diminution of his rent because of barrenness, hail, or other accidents.\*

VI.

499. *Accidents of two Kinds, Natural, and those which are the Act of Man.* — The covenant which obliges the farmer to pay his rent, notwithstanding accidents, does not extend to that which may happen by the hand of man, such as an open force, a war, a fire, and other accidents of the like kind, which no man could foresee.<sup>e</sup> But it is to be understood only of what falls out naturally, through the injury of the weather, and which it is reasonable to expect; such as a frost, an inundation, and other cases of the like nature.

VII.

500. *Renewing of the Lease.* — If, the term of the lease of a farm being expired, the lessor suffers the farmer to remain in possession, and the farmer continues to manage the farm, the lease is renewed by this tacit consent.<sup>f</sup>

<sup>d</sup> This is a consequence of the nature of these two kinds of revenues.

<sup>e</sup> L. 2, § 2, D. loc.; — l. 2, C. cod. See the following section.

<sup>f</sup> L. 2, in f. D. de trans. See the twenty-first article of the second section of Comments

<sup>g</sup> L. 12, § 11, D. loc.

## VIII.

501. *Divers Effects of a tacit Renewal of the Lease.*—The tacit renewal of the lease continues it either only for the year which is begun anew, or even for two years, or for the same space of time as the first lease, or for a shorter time, according to the intention of the contractors and the circumstances. Thus, when the lease is of such a nature, that there is an inequality of the produce between one year and another, as if, in a lease of arable lands for several years, there were a greater number or some of the best fields to be ploughed up one year more than the other, the tacit renewal of the lease could not be for less than two years. Thus, in leases of houses, the landlord and the tenant may, when they please, interrupt the lease that is thus tacitly renewed, they giving one another a certain time to provide themselves in, according as it is regulated by custom, or by the judge. But if it is a place, the use of which demands in its own nature a longer prorogation of time, then the renewing of the lease will take place for the time of that use. Thus, the tacit renewing of the lease of a *vine* reaches to the time of harvest, and that of a wine-press, to the season of the vintage.<sup>a</sup>

## IX.

502. *The tacit Renewal of the Lease renews the same Conditions.*—The tacit renewal of the lease renews likewise all its conditions. For it is only a continuance of the first lease, with all its consequences. But if in the first lease there were sureties, their engagement ends with the lease, and is not renewed by the tacit renewal of the lease, unless they have reiterated their consent; because their obligation was limited to the time of the lease in which they engaged themselves.<sup>1</sup>

<sup>a</sup> L. 13, § 11, *D. loc.*; — l. 14, *D. loc.*; — l. 16, *C. cod.*; — d. l. 13, § *ult.*

<sup>1</sup> L. 13, § 11, *D. loc.*; — l. 19, *C. cod.* We have not set down in this article that the renewal of the lease renews the mortgage. For that which is said in the laws quoted on this article, that the pledge remains, or is renewed by the renewal of the lease, ought to be understood only, according to our custom, of what is tacitly mortgaged to the proprietor for the rent of his farm, and without covenant, as the fruits of the ground. But the mortgage which the proprietor had expressly by his lease on the goods of the farmer is extinguished with the lease, and the renewal of the lease does not renew this mortgage, unless it were done in the presence of public notaries. And then this second mortgage would have its effect only from the time of its date. And it is the same thing with respect to the mortgage which the farmer has on the estate of the proprietor. See the third article of the first section, and the third article of the seventh section of *Mortgages*.

## SECTION V.

## OF THE ENGAGEMENTS WHICH THE FARMER IS UNDER TO THE PROPRIETOR.

## ART. I.

503. *The Farmer ought to use the Lands as any careful Man would do, if they were his own.* — The farmer ought to use the lands he has in farm as any prudent, discreet man would do, if they were his own, and to keep them, preserve and cultivate them, in the manner as is agreed on by the lease, or regulated by custom. And he cannot, to increase his profits out of the lands, make any innovation which may be of prejudice to the proprietor. Thus, if in a farm there are arable lands, he cannot sow them when they ought to lie fallow, nor sow wheat when he ought only to sow barley or oats, if these changes would make the lands to be in a worse condition at the end of the lease than they ought to be when they are restored to the proprietor. And the farmer ought likewise to cultivate the grounds in their proper seasons, and according to custom.<sup>a</sup>

## II.

504. *The Fruits are mortgaged for the Rent.* — The fruits and profits of the ground that is farmed out are mortgaged for the rent of the farm, whether the farmer continues in the possession of the farm himself, or substitutes another in his place, or lets it out to under-tenants.<sup>b</sup>

## III.

505. *The Farmer who shares the Fruits with the Owner bears the Loss of all Accidents.* — He who holds a farm on condition to give to the proprietor a certain portion of the fruits, and to keep the remainder for himself, for his manuring and sowing the grounds, can claim nothing from the proprietor, either for the tillage or the seed, whatever loss may happen by an accident, even although he should have no crop at all. For their lease makes between them a kind of partnership, in which the proprietor gives

<sup>a</sup> L. 23, § 3, D. loc.

<sup>b</sup> L. 24, § 1, D. loc.; — L. 53, cod. See the twelfth article of the fifth section of Mort-



the land, and the farmer or tenant the seed and the tillage; each of them hazarding the portion of the fruits to which this partnership entitles him.\*

## IV.

506. *The Effect of Accidents in a Lease which is only for one Year.* — If a farmer, who has a lease only for one year, and is obliged to pay his rent in money, reaps nothing because of some accident, such as a frost, a storm of hail, an inundation, and other cases of the like nature; or even because of some act of man, as if in a time of war the whole crop is destroyed, or taken away by force; he shall be discharged from paying his rent, or shall recover it if he has already paid it.<sup>d</sup> For it is but reasonable that, in the case of a lease, where the lessor secures to himself a rent, the lessee should be secure of enjoying something: and besides, the lease is of the fruits which the farmer shall reap, and which it is presupposed that he will reap. But if it was agreed that the accidents should fall upon the farmer, he will then be obliged to pay his rent, notwithstanding these losses.

## V.

507. *A Small Loss occasioned by the Nature of the Lands, or Fruits, or some other Cause.* — If without an extraordinary accident, and only through the nature of the land itself, and of the fruits, or because of some ordinary event, there happens some loss that is not very considerable; as if the fruits are not of a good quality, or not in quantity enough; if tares growing up with the corn diminish the crop; if passengers have done any slight damage to the fruits; in these cases, and others of the like nature, the farmer cannot pretend any diminution of his rent for these kinds of small losses, although his lease were only for one year: for since he was to have the whole profit, how great soever it should be, it is but just that he should bear these inconsiderable losses.\*

\* L. 25, § 6, D. loc. As to the farmer who pays a certain rent, see the following article.

<sup>d</sup> L. 15, § 2, D. loc. See the text cited on the preceding article, and the fifth and sixth articles of the fourth section, and the seventh article of this section.

\* L. 15, § 2, D. loc.; — d. l. 15, § 5; — d. l. 15, § 2; — v. l. 78, in f. D. de contr. empt.; — l. 25, § 6, D. loc. See the following articles.

## VI.

508. *A Considerable Loss by the same Causes, or other Accidents.* — If the damage which has happened to the farmer who has a lease only for one year proves to be considerable; whether it has been occasioned by the events mentioned in the foregoing article, or by a storm of hail, a frost, or other accident; although the loss be not of all the fruits of the farm, yet the farmer ought to have an abatement of some part of his rent, such as the judge in his prudence shall think fit to decree.<sup>1</sup>

## VII.

509. *Compensation of Good and Bad Years.* — If, the lease being for two or more years, there happens in some of them accidents which occasion losses, whether it be of the whole fruits or a great part of them, and these losses are not compensated by the profits of the other years, the farmer may demand an abatement of his rent, according as the quality of the loss and the other circumstances may render his demand just. But if there was any covenant in the lease, or any custom of the place, which did regulate the case of losses of this kind, it would be necessary to keep that.<sup>2</sup>

## VIII.

510. *The Loss of the Seed and Tillage falls on the Farmer.* — In all the accidents which cause any loss to the farmer, for which he may claim an abatement, either of the whole rent, or a part of it, he cannot demand any damages, either for the profits which he might have reaped, or even for the seed or tillage.<sup>3</sup> For he was obliged to be at these charges, that he might have a right to the fruits.

<sup>1</sup> L. 25, § 4, D. loc.; — L. 15, § 2, D. loc. See the following article.

<sup>2</sup> L. 8, C. de loc.; — v. L. 18, eod.; — L. 15, § 4, D. loc.; — L. 19, C. eod. See the preceding articles.

If the loss happened the first year of the lease, and proved to be of the whole crop, would it be necessary that, in expectation of the end of the lease, to judge whether there would be ground for an abatement or not, the farmer should be compelled to pay the first year's rent, the consequences of which might perhaps diminish the crops of the following years; as if a shower of hail had not only destroyed the fruits of a vineyard or other plantation, but likewise damaged or broken the vines or trees? And would it not be just to defer the regulating of the abatement till the end of the lease, if there should then appear to be ground for it, and to leave it to the prudence of the judge to grant in the mean while some delay for the payment of the first year's rent, or a part of it, according to the circumstances of the quality of the loss, and the condition of the proprietor, if he is able to tarry, as also the condition of the farmer, if he is not able to pay?

<sup>3</sup> L. 15, § 7, D. loc.; — d. L. § 2. See the third article of this section.

## IX.

511. *The Farmer cannot quit his Farm.*—The farmer cannot quit his farm, nor cease to manure it; and if he fails either to till the ground, or to perform any other engagement, as if he was obliged to any repairs, the proprietor may bring his action against him, both to compel him to perform his engagements, and to make good the damages which he has suffered by the interruption of the lease.<sup>a</sup>

## SECTION VI.

OF THE ENGAGEMENTS WHICH THE PROPRIETOR IS UNDER TO THE FARMER.

## ART. I.

512. *What the Proprietor is bound to furnish to the Farmer.*—Besides the engagements which the person is under who lets any thing to hire, which are explained in the third section, he who lets out a country farm ought to furnish that which the lease obliges him to, for manuring the grounds, and gathering in the fruits, such as barns, tubs and presses for making wine, and other things, according as it is agreed between the parties, or regulated by custom.<sup>a</sup>

## II.

513. *Movables and Tools given to the Farmer.*—If the proprietor furnishes the farmer with any movables and instruments for cultivating the farm, the farmer is obliged to take care of them, pursuant to the rules explained in the third and following articles of the second section. But if these things are estimated in the lease at a certain price, it will be a sale, and they will be the farmer's own.<sup>b</sup>

## III.

514. *Repairs made by the Farmer.*—If the farmer has made any repairs, or been at other necessary charges, which he was not bound to by his lease nor by the custom of the place, the pro-

<sup>a</sup> L. 24, §§ 2 et 3, D. loc.

<sup>b</sup> L. 12, § 2, D. loc.;—l. 15, § 1, cod.;—l. 24, § 4, versic. item cod.

<sup>c</sup> L. 3, D. loc.

prietor will be obliged to reimburse him of what he has laid out, or to discount it on the rent.\*

## IV.

**515. *The Expenses, which the Farmer has been at, the Lease being interrupted.*** — If a farmer, whose lease might be interrupted by some event which he ought to have foreseen, has nevertheless been at some charges, in hopes that he should enjoy the farm for a certain time; as if he has laid up any great store of provisions, bought cattle, or been at other expenses of this kind; he cannot pretend to recover any of them, if his lease is interrupted by the event which he had reason to expect. As if it was a lease granted by one who had only the use and profits of the estate, which came to cease by the death of the usufructuary, who had let out only what right he himself had; or a lease that was to be dissolved by the event of some condition. For the farmer knowing that these expenses might become altogether useless, he was willing to run the hazard of the losses which he might suffer thereby.<sup>d</sup>

## V. -

**516. *Improvements made by the Farmer.*** — If a farmer has made improvements which he was not bound to make; as if he has planted a vineyard, or an orchard, or made other improvements of this kind, which have increased the revenue of the farm; he will recover the expense he has been at on this account, pursuant to the rule explained in the seventeenth article of the tenth section of the *Contract of Sale*.<sup>e</sup>

## VI.

**517. *If the Farmer is molested by the Proprietor.*** — If the farmer is molested either by the proprietor himself, or by persons whom the proprietor might hinder from giving him any disturbance, he shall be liable to make good the damages which the farmer sustains, and all the profit which he might have made of his farm during the time which his lease had yet to run; unless the trouble that was given him was only of a few days, and that, matters being still entire, he were reëstablished in the peaceable possession of his farm.<sup>f</sup>

\* L. 55, § 1, D. loc.

<sup>e</sup> L. 55, § 1, D. loc.; — l. 61, D. loc.; — l. 16, C. de evict.

<sup>f</sup> L. 24, § 4, D. loc.; — l. 33, in f. D. loc.

<sup>d</sup> L. 2, § 1, D. loc.

## VII.

518. *Of the Trouble which the Proprietor could not prevent.* — If the disturbance given to the farmer is an open violence, or a fact which the proprietor is not able to hinder, and for which he is not accountable, he shall be obliged only to abate of the rent in proportion to the farmer's loss by this disturbance; or to give back so much of it as he had already received. But he will not be bound to make up the profit which the farmer might have made, if he had enjoyed his farm peaceably.<sup>a</sup>

## SECTION VII.

OF THE NATURE OF UNDERTAKINGS OF WORK BY THE GREAT, AND OF OTHER WAYS OF LETTING OUT MAN'S LABOR AND INDUSTRY.

## ART. I.

519. *Definition.* — In undertakings of work by the great, and the other ways of letting out the labor of workmen, the lessor is he who gives out the work, or business to be done; and the lessee, or undertaker, is he who undertakes the business or work.<sup>a</sup>

## II.

520. *Difference of Undertakers, according as they furnish any of the Materials, or not.* — The undertaker is sometimes only charged with the bare work, as an engraver to whom a seal is given to be engraven; or with a bare labor, as a carrier; or sometimes he is bound to furnish the materials for the work, together with his own labor, as an architect, who furnishes the materials for the building, together with his direction and oversight of the work.<sup>b</sup>

## III.

521. *Of him who furnishes the Materials, and undertakes the Work.* — If the workman furnishes all the materials, and his work, such as has been agreed on, for a certain price; as if a goldsmith undertakes to make a piece of silver plate of such a fashion, and for such a price, and furnishes the silver; it will be a sale, and not a letting to hire. But if the silver is given to the goldsmith, and

<sup>a</sup> L. 33, in *f. D. loc.*

<sup>b</sup> L. 30, § 3, *D. loc.* See the second article of the first section.

<sup>c</sup> L. 13, § 3, *D. loc.*; — *d. l.* 13, § 1; — *l.* 30, § 3, *cod.*

he is only to furnish the workmanship, it will be a letting to hire, or an undertaking by the great.<sup>e</sup>

## IV.

522. *Of the Architect who furnishes every Thing.* — If an architect who undertakes a building engages to furnish the materials, it will be a letting to hire, and not a sale, although it seems as if he sold the materials. For besides that his principal obligation is to give his direction and over-sight for the building,<sup>d</sup> he does not sell the ground, to which the building is only an accessory.

## V.

523. *Conditions of Undertakings.* — In undertakings of work by the great, and other covenants which respect the labor of persons, the parties may regulate what shall be furnished by him who gives out the work to be done, the quality of the work, the time within which it shall be finished, and other conditions of this kind; and whatever shall be regulated by the contract ought to be performed.<sup>e</sup>

## VI.

524. *What Things are to be regulated by the Judgment of Skilful Men.* — If all that is to be done or furnished by the undertaker is not plainly enough regulated by the contract;<sup>f</sup> as if the quality of the materials which he is to furnish, or the quality of the work, is not expressed, or the time not fixed; all these things, and others of the like kind, shall be regulated either according to custom, if there is any concerning this matter, or<sup>g</sup> by the judgment of skilful persons.<sup>h</sup>

<sup>e</sup> L. 2, § 1, *D. loc.* — § 4, *Inst. cod.* It is to be remarked, touching the case spoken of in this article, and others of the like nature, that, all bargains of this kind implying the condition that the work shall be well done, it may be said that, at the time of the contract, it is, as it were, a letting to hire, and an undertaking by the great; and that in the execution of the contract it is, as it were, a sale. And this is it that has given occasion to the doubt, mentioned in the texts quoted on this article, whether it were a sale or a letting to hire. See the following article.

<sup>d</sup> L. 22, § 2, *D. loc.* See the second article of the first section, and the ninth article of the following section.

<sup>e</sup> L. 15, § 1, *D. loc.* See the seventh article of the second section of *Covenants*.

<sup>f</sup> See the sixteenth article of the second section of *Covenants*, and the sixth article of the following section.

## SECTION VIII.

OF THE ENGAGEMENTS OF THE PERSON WHO UNDERTAKES ANY  
WORK OR LABOR.

## ART. I.

525. *Undertakers answerable for their Ignorance.*— Besides the engagements which are common to all persons who hire a thing, and which have been explained in the second and fifth sections, those who undertake any business or work ought, moreover, to be answerable for all the defects occasioned by their ignorance; for they ought to know how to do that which they undertake, and it is their fault if they are ignorant of what they profess.\*

526. *Defects of the Materials which the Workman is to furnish.*— If the undertaker is obliged to furnish any materials for the work, as an architect, who has undertaken to furnish the materials for a building, he ought to give them good and well conditioned; and likewise to answer for the defects which he is ignorant of; for he is bound to give that good in its kind which he ought to give; as he who lets a thing to hire is obliged to give it such as it ought to be for the use for which it is designed.<sup>b</sup>

## III.

527. *What Care Workmen and Undertakers are bound to take.*— The workman, or artificer, who takes a thing into his custody to work on it, and he who undertakes barely to keep a thing for a certain price, as he who undertakes to keep cattle, ought to preserve that which is intrusted to them with all the care that is possible to be taken by persons that are the most watchful and diligent. And if, for want of such a care, the thing perishes, although even by an accident, they will be made accountable for it, as if the thing is stolen, or burnt, or damaged, for want of having been laid up in a secure place, or for not being carefully looked after. And it would be the same thing if a workman, having in his custody

\* L. 132, D. de reg. jur.; — l. 9, § 5, D. loc.; — l. 13, eod., — l. 25, § 7, eod.; — l. 51, § 1, D. loc. See the sixth article of this section.

<sup>b</sup> L. 19, § 1, D. loc.; — l. 9, § 5, D. locati. See the seventh article of the eleventh section of the Contract of Sale.

things belonging to several persons, had given to one that which belonged to another although by mistake.\*

## IV.

528. *Of the Defect of the Thing.*—If that which is given to a workman to be wrought perishes in his hands, without his fault, and merely through a defect in the thing itself; as if an amethyst which is given to be engraven happens to break in the hands of the engraver, through some defect of the matter, and not through his unskilfulness, he shall not be accountable for it, unless he has undertaken the work at his own peril.<sup>4</sup>

## V.

529. *The Care of Carriers and Watermen.*—Carriers and watermen, and all those who undertake to carry merchant goods, or other things, are answerable for the custody, carriage, and transportation of the things which they take under their charge, and to use all the application and take all the care of them that is possible. And if any thing perishes or is damaged through their fault, or the fault of the persons whom they employ, they ought to answer for it.<sup>5</sup>

## VI.

530. *Work to be done to the Owner's Content, or the Arbitration of another Person.*—If it is agreed that a work shall be done to the owner's satisfaction, or according to the arbitration of a person who is named, the workman shall be bound only to deliver the work good, such as will be approved of by skilful men.<sup>6</sup> For these kinds of covenants imply the condition, that what shall be regulated shall be reasonable.<sup>7</sup>

\* L. 13, § 6, *D. loc.*; — l. 34, in *f. D. de dam. inf.*; — l. 40, *D. loc.*; — l. 5, § 1, *D. non. comp.*; — l. 60, § 2, *D. loc.* See the second article of the second section of the *Loan of Things to be restored in Specie*; the fourth article of the third section of *Deposit*; and the fifth article of the first section of *Persons who drive any Public Trade*.

<sup>4</sup> L. 15, § 5, *D. loc.*

<sup>5</sup> L. 13, § 2, *D. loc.*; — l. 25, § 7, *D. cod.* See the fourth article of the second section of *Persons who drive any Public Trade*.

<sup>6</sup> L. 24, *D. loc.*

<sup>7</sup> See the eleventh article of the third section of *Covenants*. The Emperors Gratian, Valentinian, and Theodosius ordained, that the undertakers of public works, and their heirs, should be answerable for the space of fifteen years for the defects of the work. L. 8, *C. de op. publ.*



## VII.

531. *Work made according to the Master's Direction.*— Although the workman ought to answer for the defects of the work, yet if the owner himself has ordered and directed the work, he cannot complain of it.<sup>b</sup>

## VIII.

532. *If the Work perishes before it is approved of.*— If one has given materials to a workman, to make a work at a certain rate for the whole, the undertaker will not have performed his engagement, nor be discharged from it, until the whole work has been examined, and it appears to be such as it ought to be. And if it is a work which consists of several pieces, or is to be measured, and a certain price to be paid for each piece, or each measure, the undertaker shall be discharged in proportion to what shall be counted or measured and approved of. And, on the contrary, the undertaker shall bear the loss of his work, and make good the damages of the master (if he suffers any), for so much of the work as is found not to be of the quality which it ought to have. But if, in the case of either of these two bargains, the thing perishes by an accident before the work is proved, the master shall bear the loss, and be accountable for the price of the work, especially if it was his fault that the work was not proved; unless it did appear that the work was not such as ought to be received.<sup>1</sup>

## IX.

533. *If the Edifice perishes while it is Building.*— If an architect, having undertaken to build a house, or other edifice, and having finished it, or only a part of it, it happens to be destroyed by an inundation, an earthquake, or other accident, the whole loss will fall upon the owner; and he will, notwithstanding the loss, be accountable both for the materials which the undertaker has furnished, and for what is due on account of the workmanship. For whatever was built upon his ground was delivered to him. But if the building perished through the defect of the work, the architect shall lose his labor, together with all the materials that are destroyed; and he will likewise be liable for the damage which the master suffers on this account.<sup>1</sup>

<sup>b</sup> L. 51, in f. D. loc.

<sup>1</sup> L. 36, D. loc.; — l. 37, D. cod. See the first article of this section, and the following article.

<sup>1</sup> L. 39, D. loc.; — l. ult. cod.; — l. 39, D. de rei vind. See the first article of this section.

## X.

534. *If the Workman is to furnish every Thing, and the whole perishes.*—If the workman was to furnish all the materials, as in the case of the third article of the seventh section, and the thing perishes by an accident, before the work has been delivered, the whole loss, both of the stuff and fashion, will fall upon the workman. For this is a sale, which is not accomplished till the workman has delivered his work.<sup>m</sup>

## XI.

535. *Accessories to the Engagement of the Undertaker.*—He who has undertaken a work, a labor, the carriage of something, or any other thing of this kind, is not only bound to perform what is expressly contained in the bargain, but likewise to do every thing that is accessory to the work, or thing which he has undertaken. Thus, masters of stage-coaches, wagoners, and carriers, pay the tolls and ferry-boats which are on the road; for these are charges which respect the carriage.<sup>n</sup> But they do not pay the customs, and other duties which are laid upon the goods which they carry. For these duties have nothing to do with the carriage of the goods, but are exacted of the owners.

## SECTION IX.

OF THE ENGAGEMENTS OF THE PERSON WHO GIVES OUT ANY WORK

## ART. I.

536. *Engagements of the Person who gives any Work to be done.*—He who gives out a work to be done is obliged to furnish to the undertaker that which he is bound to by the bargain; whether it be to furnish any stuff, to give the workman his diet, or that he is obliged to any other thing.<sup>\*</sup>

## II.

537. *He owes the Price, with the Interest, if he is in Delay.*—He ought likewise to pay the price, whether it be after the whole

<sup>m</sup> This is a consequence of the third article of the seventh section.

<sup>n</sup> L. 60, § 3, D. loc.

<sup>\*</sup> L. 15, § 1, D. loc. See the first article of the sixth section

work is finished and delivered, or in proportion to the quantity of the work that is done, or even beforehand, according as it has been regulated by the agreement; and if he fails to pay at the term, he shall be obliged to pay the interest of the price from the time of the demand.<sup>b</sup>

### III.

538. *Discharge from advancing the Price in Case of Danger.* — If it was agreed that the price of the work, or a part of it, should be paid beforehand, and afterwards there appeared to be danger in advancing the money, he that gave out the work cannot be compelled to advance the money, unless the undertaker gives security.<sup>c</sup>

### IV.

539. *If the Thing perishes through some Defect in itself, or by the Act of him who gives it out.* — If a thing that is given out to a workman, to have something done to it, happens to perish because of some defect in the thing itself, or by some act which he who gave it out ought to answer for, he will be liable to pay the workman what he had done and furnished for the work, as in the case of the fourth article of the eighth section.<sup>d</sup>

### V.

540. *If the Work is not done against the Time appointed.* — If it has not been the fault of the workman, or artificer, that the work has not been finished within the time agreed on, and skilful men be of opinion that the time allowed for finishing the work was not sufficient, he who gave it out ought to allow the time that is necessary, and cannot pretend any damages for the delay, even although they have been stipulated in case the work were not done within the time; for no covenant obliges people to that which is impossible.<sup>e</sup> But if the work was promised against a certain day, and for a use which could not admit of delay; as if it was to be sold at such a fair, or to be ready for such an embarkation; the

<sup>b</sup> See the seventeenth article of the second section.

<sup>c</sup> L. 58, § 2, *D. loc.* See the twenty-second article of the tenth section of the *Contract of Sale*.

<sup>d</sup> This is a consequence of the fourth article of the eighth section.

<sup>e</sup> L. 58, § 1, *D. loc.*; — v. L. 13, § 10, *loc.* See the sixth article of the fifth section of *Covenants*, the twelfth article of the twelfth section, and the nineteenth article of the second section of the *Contract of Sale*.

undertaker would be liable to make good the damages of the delay, and ought to blame himself for having undertaken what he was not able to perform.

## VI.

541. *Of the Laborer, whose Fault it was not that he did not work.* — If it has not been the fault of the laborer, that he did not do the work, or perform the service, which he had promised within a certain time; and that during that time he has not been employed any other way; he who engaged him in his service is bound to pay the salary for the time which he has made the laborer lose.<sup>f</sup>

## VII.

542. *If the Master delays to receive the Work.* — If he who gave out the work to be done delays to receive it after it is finished, or refuses it without a good reason, and the thing perishes after his delay, he shall nevertheless be bound to pay the price of the work.<sup>g</sup>

## VIII.

543. *If the Undertaker is at any Charge.* — If, besides the workmanship, the workman, or undertaker, has been at any expense in preserving the thing, the person who gave the work out shall be bound to reimburse him.<sup>h</sup>

## SECTION X.

OF LEASES OR PERPETUITY, OR FOR A LONG TERM OF YEARS.

544. *The Subject-matter of this Section.* — Emphyteutical leases, or leases for perpetuity, or a long term of years, have been a consequence of the leases of farms. For since the owners of barren lands could not easily find tenants for them, a way was invented, to give in perpetuity such kind of lands, on condition that the grantee should cultivate, plant, and otherwise improve them, as the word *emphyteusis* signifies. By this agreement, the proprietor

<sup>f</sup> L. 38, D. loc.; — l. 19, § 9, cod.; — d. l. 19, § ult.; — v. l. 61, § 1, D. loc.

<sup>g</sup> L. 36, D. loc.

<sup>h</sup> See the seventh article of the third section.

finds on his part his account, by assuring to himself a certain and perpetual rent; and the perpetual tenant finds likewise his advantage, in laying out his labor and industry to change the face of the ground, and to make it fruitful.

Seeing the matter of emphyteutical or perpetual leases takes in quitrents, and other kinds of ground-rents, and that the conditions of perpetual tenants are different, according to the diversity of their grants, and according to the custom and usage of places, we are not to enter here into the detail of this matter. Thus, we shall not insert here the rules of law concerning fines of alienation, nor those which relate to the right which the lord of a manor has on lands that are part of his manor, which are different in different countries, but shall confine ourselves to such rules as are of the Roman law. And we shall lay down only the general principles, which are both agreeable to the Roman law and to our usage, such as are observed in all the customs, and are the fundamental maxims of the law touching this matter.

## ART. I.

545. *Definition of Perpetual Leases.*—A perpetual or emphyteutical lease is a contract by which the owner of an estate in land gives it to a tenant to cultivate and improve it;<sup>a</sup> and to enjoy it and dispose of it for ever,<sup>b</sup> on condition that the tenant pay him a certain rent in money, corn, or other kind,<sup>c</sup> and that he bear the other charges which they agree on.

## II.

546. *All Lands may be let out upon Leases for Perpetuity.*—Although the *emphyteusis* seems to be restrained by its primitive institution to barren lands, yet leases for perpetuity are given of lands which are fruitful and in a good condition. \*And such leases are likewise granted of possessions which of their own nature produce no manner of fruit, but which yield other revenues, such as houses and other buildings.<sup>d</sup>

<sup>a</sup> This is what is meant by *jus emphyteuticum*, which is the word used in the title of this matter, which denotes that the lands are given to the tenant, that he may cultivate, plant, and improve them. L. 3, C. de jur. emphyt.

<sup>b</sup> § 3, Inst. de locat. et cond.; — l. 1, D. si ager rect. id est, emphyt. pet.; — l. 1, C. de adm. rer. publ.

<sup>c</sup> L. 5, C. de agric. et cens.; — § 3, Inst. de locat. et cond.; — l. 2, § 2, C. de agric. et cens.

<sup>d</sup> L. 3, C. de locat. præd. civil.; — l. 15, § 26, D. de damn. inf.; — Nov. 7; — C. 3, § 2.

## III.

547. *Difference between Perpetual and other Kinds of Leases.*— Perpetual leases are distinguished from the common leases of farms\* by two essential characters, which are the foundation of the rules that are peculiar to perpetual leases. The first is the perpetuity of the lease;† and the second is the translation of a kind of property.‡

## IV.

548. *Perpetuity of the Emphyteutical Lease.*— The perpetuity of the emphyteutical lease makes it to pass, not only to the heirs of the perpetual tenant, but likewise to all those who succeed to his right, whether by donation, sale, or any other kind of alienation. And they can never be dispossessed by the owner of the lands, and his successors,<sup>h</sup> unless in the cases which shall be explained in this section.

## V.

549. *The Perpetual Lease shares the Rights of Property.*— The translation of property which is made by perpetual lease is proportioned to the nature of this contract, where the owner gives the lands and reserves the rent. And by this covenant there is made, as it were, a partition of the rights of property between the owner of the lands and the perpetual tenant. For the owner who grants the perpetual lease remains master in so far as to enjoy the rent which he has reserved, as the fruit of his own proper lands, by which he retains the chief right of property, which is that of enjoying the thing as owner of it, together with the other rights which he has reserved to himself. And the perpetual tenant, on his part, acquires the right of transmitting the estate to his successors for ever, of selling it, giving it away, alienating it, with the burden of the rights which the lessor of the lands has reserved to himself; as also a right to plant, to build, and to make what other changes he

\* § 3, *Inst. de locat. et cond.*; — l. 1, *C. de jur. emphyt.*

† § 3, *Inst. de locat. et cond.*; — l. 1, *C. de off. com. sacr. pil.*; — ll. 1 et 3, *C. de locat. prod. civil.*; — l. 10, *Cod. de loc. et cond.*

‡ L. 12, *C. de fund. patr.* See the following articles. There are some emphyteutical leases which are not perpetual, but only for a long term of years, such as a hundred, or ninety-nine years.

<sup>h</sup> § 3, *Inst. de locat. et cond.*

shall think proper, for improving the estate, which are so many rights of property.<sup>1</sup>

## VI.

550. *Property Direct and Useful.*— The rights of property which the master retains, and those which are conveyed to the perpetual tenant, are commonly distinguished by the names of *direct property*, which is given to the right of the master; and *useful property*, which is given to the right of the tenant. The meaning of which is, that the first master of the estate retains his original right of property, except in so far as he transmits a share of it to the perpetual tenant; and that the perpetual tenant acquires the right of enjoying and disposing of the estate, with the burden of the rights that are reserved to the master of the lands. And it is for this reason that, in the Roman law, the perpetual tenant is considered in a double capacity, either as being or not being the master of the estate, according to the different views and the different effects of these two kinds of property.<sup>1</sup>

## VII.

551. *Mutual Engagements which result from the Perpetual Lease.*— The perpetual tenant, on his part, is obliged to pay the perpetual rent, and to perform the other conditions regulated by his lease, and by custom; such as the duty of fines of alienation which those persons are bound to pay who come into the estate of the perpetual tenant, either upon all kinds of changes of a tenant, or upon some, or only upon sales, according as it is regulated by the lease, or by custom; the right of preëmption, when the perpetual tenant has a mind to sell the estate, and others of the like nature. And he who grants the perpetual lease is obliged, on his part, to warrant the estate, and to take it back, and discharge the perpetual tenant of the rent, if he, finding it too hard, is willing to give it up.<sup>m</sup>

<sup>1</sup> L. 1, C. de jur. emphyt.; — § 3, Inst. de loc. et cond.; — l. 12, C. de fund. patrim.; — § 3, Inst. de loc. et cond.

<sup>1</sup> L. 12, C. de fund. patrim.; — l. 1, § 1, D. si ager vectig. id est emphyt. petat.

<sup>m</sup> § 3, Inst. de loc. et cond.; — l. 1, C. de jur. emphyt.; — l. 2, eod. See the origin of the right of fines of alienation, of the right of redemption and preëmption, in the third law of the same title.

The perpetual tenant has a right to give up the estate to the direct lord of the lands, if he finds himself overcharged by the rent. There is nothing said here of the rules concerning this matter, which are established by custom. It is sufficient to remark, that this

## VIII.

552. *Who bears the Losses occasioned by Accidents.*—It follows from the nature of these perpetual leases, that all the accidents which destroy only the revenues, or the improvements made by planting, building, and others, of what kind soever they be, that are made by the perpetual tenant, are to his loss. For he was obliged to make improvements, and it was for his behoof that the estate was improved. And the accidents which destroy the lands fall both upon the master, who suffers the loss of his estate, and likewise upon the perpetual tenant, who loses the improvements which he had made upon it.<sup>a</sup>

## IX.

553. *The Perpetual Tenant cannot commit Waste.*—It is likewise a consequence of the nature of perpetual leases, that the perpetual tenant cannot commit waste, or damage the estate, nor even take away the improvements which he had made upon it. And if he commits waste, the master of the lands may get the perpetual lease to be vacated, may enter again to the possession of his estate, and oblige the tenant to repair what has been wasted. But the perpetual tenant may make what changes are useful, and such as any careful and diligent master would do; such as the cutting down of old trees, in order to plant new ones; the demolishing that which is falling to decay, in order to rebuild it; and others of the like nature.<sup>o</sup>

## X.

554. *The Perpetual Lease vacated for Non-payment of the Rent.*—This is also another consequence of the nature of perpetual

right is founded on the losses or diminutions which may happen to the estate, and on the injustice that it would be to force the tenant to pay a perpetual and excessive rent, if the estates were not able to afford it; since, in leases for a few years, cases and abatements of the rent are granted to farmers, because of the diminution of the fruits of the ground. See the following article.

<sup>a</sup> *L. 1, C. de jur. emphyt.*; — § 3, *Inst. de loc. et cond.* We have not set down in this article the case of the loss of a part of the lands, as if an inundation has carried off the half, or more or less of the estate. For although what remains is liable for the whole rent, yet the liberty which the perpetual tenant has of yielding up the estate to the master puts it in his power to free himself of the rent by abandoning the estate, or that which remains of it, in the condition in which he ought to restore it, pursuant to the rules established for cases of this kind.

<sup>o</sup> *Nov. 7, cap. 3, § 2*; — *Nov. 120, c. 8*; — *l. 15, D. de usufr.* Although this law relates to the usufructuary, yet it may with much greater reason be extended to the perpetual tenant, who possesses only on condition that he do improve the lands.



leases, that, in case of non-payment of the rent, the perpetual tenant may be ejected, even although there were no clause for vacating the lease in this case,<sup>p</sup> unless he makes payment within the time limited by the judge.<sup>q</sup>

## XI.

555. *The Expenses are not refunded.* — If the perpetual tenant has made improvements on the estate, and is ejected for default of payment of the arrears of his rent, he cannot pretend to be reimbursed his expenses.<sup>r</sup> For the estate was given him on condition that he should improve it. But it will be prudent for the judge to grant, according to the quality of the improvements, and the other circumstances, a reasonable delay, that the perpetual tenant may be thereby in a condition, either to pay what he is in arrear, and to retain the estate, or be able to sell it.<sup>s</sup>

## TITLE V.

### OF THE LOAN OF THINGS TO BE RESTORED IN SPECIE, AND OF A PRECARIOUS LOAN.

556. Our language having no proper word whereby to express this contract, which the Romans call *commodatum*, where one lends a thing to another gratuitously, that he may use it, and restore it after he has done with it; we have expressed this contract by a circumlocution, calling it the loan of things that are to be restored in specie, that it may be distinguished from the loan of money, and other things which may be repaid in kind, to which contract the Romans gave the name of *mutuum*, and of which we

<sup>p</sup> *L. 2, C. de jure emphyt.*; — *Nov. 7, c. 3, § 2*; — *Nov. 120, cap. 8.*

<sup>q</sup> See the eighth article of the third section of the *Contract of Sale*, and the twelfth and thirteenth articles of the twelfth section of the same title.

<sup>r</sup> *L. 2, C. de jur. emph.*

<sup>s</sup> *Licentia emphyteutæ detur, ubi voluerit, et sine consensu domini, melliorationes suas vendere. L. 3, eod.* Although the words of this law do not concern the present case, yet they may be applied to it; because it is always true, that the perpetual tenant may sell the estate, and the improvements made on it. And it is but just to grant him a delay for using this right, in the case where he would lose his improvements for not paying the rent.

shall treat in the following title. For these are two different covenants, which are not to be blended together; the covenant which is explained under this title obliging the borrower to restore the same individual thing which he borrowed, as when one borrows a horse; and the other covenant obliging the borrower to restore a thing of the same kind, as when one borrows money, and other things, which we cease to have in our possession when we make use of them. The loan of things that are to be restored in specie is a contract which results naturally from the union which society establishes among mankind. For since men have not always the means of buying or hiring all the things which they stand in need of, and which they want only for a little time, humanity obliges them to assist one another with the loan of such things as they stand in need of.

557. A precarious loan is the same kind of contract with the loan of things that are to be restored in specie, and differs from it only in this, according to the Roman law, that whereas the loan of things to be restored in specie is for a time proportioned to the necessity of the borrower, or even for a certain time regulated by the contract, the precarious loan is undetermined, and lasts no longer than it pleases the lender.

558. This distinction between the loan of things to be restored in specie, and the precarious loan, is not much in use with us; and we make but little use of this word *precarious*, except in immovables, as in a sale, or other alienation, when he who alienates an estate acknowledges that, if he remain in possession of it, it shall only be precariously. Which is expressed in this manner, to denote that he shall not hereafter possess his estate but by permission from the purchaser, and in the same manner as he possesses a thing who has borrowed it. See the seventh article of the second section of the *Contract of Sale*.

## SECTION I. .

OF THE NATURE OF THE LOAN OF THINGS TO BE RESTORED IN SPECIE, AND OF A PRECARIOUS LOAN.

### ART. I. .

559. *Definition of this Loan.*—The loan of things that are to be restored in specie is a covenant by which one gives a

thing to another, that he may put it to a certain use, and keep it as long as his occasions require, without paying any price for the use of it. For if there were a price, it would be a letting to hire.<sup>a</sup>

## II.

560. *A Precarious Loan.*—A precarious loan is when a thing is lent at the desire of the person who borrows it, to be used during the time that the lender is willing to let him have it; and on condition that he shall restore it whenever the owner is pleased to call for it.<sup>b</sup>

## III.

561. *The Loan does not oblige, but by the Delivery of the Thing.*—The loan of things that are to be restored in specie is one of those kinds of covenants, whereby one obliges himself to restore a thing; and, consequently, where the obligation is not contracted but by the delivery of the thing borrowed.<sup>c</sup>

## IV.

562. *The Lender remains Proprietor of the Thing.*—It is the nature of this contract, that the lender remains proprietor of the thing which he lends, and consequently that the borrower is obliged to restore the same individual thing which he has borrowed, and not another of the same kind. For otherwise it would not be a loan of things to be restored in specie, but another kind of loan, as where one borrows provisions, or money, to consume them, and to restore as much of the same kind.<sup>d</sup>

## V:

563. *Movables and Immovables may be lent in this Way.*—We may lend in this way, not only movable things, but likewise immovables, such as a house to dwell in.<sup>e</sup>

## VI.

564. *Of Things which are consumed by their Use.*—We can-

<sup>a</sup> L. 1, § 1, *D. commod.*; — § 2, *Inst. quib. mod. re contr. obl.*

<sup>b</sup> L. 1, *E. de prec.*; — l. 2, § ult. *eod.*; — *U. l. 1*, § 2.

<sup>c</sup> § 2, *Inst. quib. mod. re contr. obl.* See the ninth article of the first section of Covenants.

<sup>d</sup> L. 8, *D. commod.*; — l. 9, *eod.*; — l. 2, *D. de reb. cred.*

<sup>e</sup> L. 1, § 1, *D. commod.*; — d. § 1, *in fine*; — l. 17, *D. de pract. verb.*

not lend in this way things which are consumed, or which cease to be by being used, such as money and provisions; for to lend them in order to consumption would be a contract of another nature; that is, a loan where the things lent are not to be restored in specie, but in kind. But we may lend these kinds of things, so as to have them restored in specie, if we lend them for any other use than that of consumption: as if we lend money to make a tender, or to deposit, on condition that the borrower take it up again, and restore the same in specie.<sup>f</sup>

## VII.

565. *The Loan of that which is Another's.*—We may lend that which is not our own. Thus, he who possesses a thing honestly may lend what he possesses and what he believes to be his own. And it is also a loan of this kind, when one lends that which he possesses knavishly, knowing it to belong to another.<sup>g</sup>

## VIII.

566. *The Lender is to regulate the Manner and Time of the Use.*—It belongs to him that lends the thing to regulate in what manner, and for what time, the borrower is to have the use of it.<sup>h</sup>

## IX.

567. *The Loan is presumed to be for the Natural Use of the Thing.*—If the use to which the thing borrowed is to be employed be not regulated by the contract, it is limited to the natural and ordinary service that may be had from it. Thus, he who lends a horse is presumed to lend him for a journey, and not for the war.<sup>i</sup>

## X.

568. *The Continuance of the Loan is proportioned to the Use for which the Thing is lent.*—If the time of the loan is not regulated by the contract, it is limited to the continuance of the use for which the thing is lent. Thus, a horse being lent for a journey,

<sup>f</sup> L. 3, § ult. *D. commod.*;—l. 4, *eod.* See the fourth article of the first section of *Lending and Hiring*.

<sup>g</sup> L. 15, *D. commod.*;—l. 16, *eod.*;—l. 64, *D. de judic.*

<sup>h</sup> L. 17, § 3, *D. commod.* See the eleventh article of the second section

<sup>i</sup> L. 5, § 8, *D. commod.*;—d. l. 5; § 7.

he who borrows him has the use of him during the time that is necessary for performing the said journey.<sup>1</sup>

## XI.

569. *Restitution of the Thing at the Time and Place agreed on.*

— If it has been agreed, that the thing lent shall be restored within such a time, and at such a place, and the borrower fails to perform what he promised, he shall be liable for the damages which he has been the cause of, according to the circumstances.<sup>m</sup>

## XII.

570. *A Loan may be either for the Conveniency of the Borrower or Lender, or both.*— A thing may be lent, either for the bare interest of the borrower; and this way of lending is the most usual; as if I lend my horse to a friend, to make a journey for his own business: or it may be lent for the mere behoof of the lender; as if I lend my horse to one whom I employ to go into the country about my affairs: or the loan may be for the common advantage both of borrower and lender; as if a partner lends his horse to his copartner, to go and look after the common concerns of the company.<sup>n</sup>

## XIII.

571. *The Precarious Loan ends by the Death of the Lender.*—

A precarious loan is at an end by the death of the lender, but it is not so with the ordinary loan of things; for the precarious loan lasts no longer than the lender is willing it should, and his will ceases by his death; but in the ordinary loan, the lender agreed to leave the thing with the borrower all the time that should be necessary for that use to which he lent it.<sup>o</sup>

## XIV.

572. *Who may borrow and lend.*— All persons who are capable of contracting may lend and borrow; and besides the natural engagements to which this kind of loan obliges the parties, they

<sup>1</sup> L. 17, § 3, *D. commod*; — l. 2, *C. eod.* See the first article of the third section.

<sup>m</sup> L. 5, *D. commod.*

<sup>n</sup> L. 5, § 2. in *f. D. commod.*; — d. l. 5, § 10; — l. 10, § 1, *eod.*; — l. 18, *eod.* See the second and following articles of the second section.

<sup>o</sup> L. 4, *D. locati.* See the third section of this title, art. 1; — l. 17, § 3, *D. commod.*

may add what other covenants they please; and we must apply to this contract the other general rules of covenants.<sup>p</sup>

XV.

573. *The Engagements of the Loan pass to the Heirs, or Executors.* — The engagements which are formed by the loan pass to the heirs or executors of the lender, and of the borrower.<sup>q</sup>

SECTION II.

OF THE ENGAGEMENTS OF THE BORROWER.

ART. I.

574. *Engagements of the Borrower.* — The engagements which he is under who borrows a thing are, to take care of it,<sup>a</sup> to use it according to the intention of the lender,<sup>b</sup> and to restore it<sup>c</sup> at the time appointed,<sup>d</sup> and in good case.<sup>e</sup> These several engagements shall be explained by the rules which follow.

II.

575. *What Care the Borrower is obliged to take.* — He who has borrowed a thing for his own use is obliged to take care of it, not only as he takes care of what is his own, if he is not careful enough of his own concerns, but with all the exactness that is usually observed by the most diligent persons; and he is to answer for all the loss and damage that may happen for want of such a due care.<sup>f</sup> For seeing he has the free and gratuitous use of that

<sup>p</sup> See the third article of the second section, the first article of the third section, and the first article of the fourth section of *Covenants*. V. l. 1, § 2, et l. 2, *D. commod.*

<sup>q</sup> L. 3, § 3, *D. commod.*; — l. 17, § 2, *cod.* See, touching the engagement of the heir or executor, the twelfth article of the third section of *Deposit*.

<sup>a</sup> L. 18, *D. commod.*

<sup>b</sup> L. 17, § 3, *D. commod.*

<sup>c</sup> § 2, *Inst. quib. mod. re contr. obl.*; — l. 1, § 3, *D. de obl. et act*

<sup>d</sup> L. 17, § 3, *D. commod.*

<sup>e</sup> L. 3, § 1, *D. commod.*

<sup>f</sup> L. 18, *D. commod.*; — l. 1, § 4, *D. de obl. et act.*; — § 2, *Inst. quibus mod. re contr. obl.*; — l. 5, § 5, *D. commod.* See the fourth article of the third section of *Deposit*. and the third article of the eighth section of *Letting and Hiring*.

There is this difference in the Roman law, between the ordinary loan of things to be restored in specie, and a precarious loan, as to the care that is to be taken by the borrower, that, in the precarious loan, he who possesses precariously the thing belonging to another is accountable only for what he does fraudulently, and for the faults which come

which is lent him, he ought to preserve it with all the circumspection that is possible to be used by the most careful persons.

### III.

576. *What Care he is obliged to, who borrows the Thing for the Master's Behoof.*—If the thing has been lent only for the interest of the lender, he who has borrowed it on this account will not be bound to take the same care of it as if he had borrowed it for his own proper use. But he shall be bound only for what may happen through his knavery,<sup>5</sup> or through any gross fault, that is next door to fraud.<sup>6</sup> For it would not be reasonable, that, to do service to another, he should be obliged to such a strict care as to be answerable for the least neglect, or the smallest fault.

### IV.

577. *What Care he is obliged to, who borrows for the Lender's Interest as well as his own.*—If the thing has been lent for the common interest both of lender and borrower; as if one partner borrows the horse of his copartner, to go and look after any affair in which the company is concerned, he shall answer for what falls out, not only through his knavery, but through his neglect and his want of care.<sup>1</sup> For he borrows partly for his own interest, and he receives a favor in a matter that concerns him.

### V.

578. *If the Contract regulates the Care that is to be taken.*—If it has been agreed what care the borrower shall be obliged to take of the thing lent, the agreement shall serve as a rule.<sup>1</sup>

### VI.

579. *Accidents.*—If the borrower has used the thing which he

near to fraud, and not for slender faults. *L. 8, § 3, D. de precar.* But the liberality of the lender, ought it to diminish the care of the borrower? And whoever lends, whether it be for a certain time, or precariously, does he lend for any other end than to do a favor to the borrower? Or if we must needs distinguish their condition, as to the care of the thing lent, is it not because he to whom the thing is lent for a certain time ought to be more careful in preserving the thing, than he to whom it is lent indefinitely, who knows not how long the lender will be pleased to let him have the use of it?

<sup>5</sup> *L. 5, § 10, l. 10, § 1, D. commod.*

<sup>6</sup> *L. 1, § 1, D. si mens. fals. mod. dir.; — l. 29, D. mand.*

<sup>1</sup> *L. 18, versic. at si D. commod.; — l. 5, § 2, D. commod.; — § ult. Inst. quib. mod. re contr. oblig.*

<sup>1</sup> *L. 23, D. de reg. jur.; — l. 5, § 10, D. commod.*

borrowed only during the time and for the purpose for which it was lent him, and the thing perishes, or is damaged, without his fault, by the bare effect of some accident, or because of the nature of the thing itself; he is not answerable for it; for no blame can be laid at his door. "And no covenant obliges naturally to answer for these sorts of events, which are a bare effect of providence, and which affect those who are the owners of the things to which the loss happens."<sup>m</sup>

## VII.

580. *The Regard which the Borrower ought to have to the Thing borrowed, more than to his own.*—If the thing borrowed perishes by an accident, against which the borrower might have guarded, by employing his own thing, he shall be obliged to make it good: for he ought not to have used it, except for want of his own. And it would be the same thing, if in a fire he had let the thing he borrowed perish, that he might save his own.<sup>n</sup>

## VIII.

581. *The Borrower may take upon himself all Accidents.*—If, in view of some danger that was to be feared, it was agreed that the borrower should be accountable for all accidents, he shall be bound to make good the damage that happens thereby.<sup>o</sup> For it was in his power not to tie himself up to this condition, and it is he himself who has put the thing in danger.

<sup>m</sup> L. 5, § 4, *D. commod.*; — l. 1, *C. eod.*; — l. 23, in *f. D. de reg. jur.*; — l. ult. *D. commod.*; — l. 18, *D. commod.*; — v. l. 20, *eod.*; — l. 2, § 7, *D. de adm. rer. ad civit. pert.*; — l. 19, *D. commod.* See the sixth article of the second section of *Proxies*, and the twelfth article of the fourth section of *Partnership*.

We may take notice, upon this article, of the distinction which is made by the divine law, between the case where the thing borrowed perishes in the absence of the owner, and where it perishes in his presence. In this last case, the loss falls upon the owner; and in the first, on the borrower. "If a man borrow aught of his neighbour, and it be hurt, or die, the owner thereof being not with it, he shall surely make it good. But if the owner thereof be with it, he shall not make it good." *Exod. xxii. 14, 15.* This distinction, is it grounded on this, that the master, being present, sees that the borrower is not any ways to blame for the loss of the thing; and that if the borrower were to be acquitted of the loss which happens in the owner's absence, it would give occasion to borrowers to misuse or neglect the things which they borrow, and even to pretend a loss which had not happened?

<sup>n</sup> L. 5, § 4, *D. commod.*

<sup>o</sup> L. 1, *C. de commod.*; — l. 7, § 15, *D. de pact.*; — l. 5, § 2, *D. commod.*; — v. l. 21, § 1, *eod.* See the seventh article of the third section of *Deposit*.



## IX.

582. *Of the Thing lent and estimated.*— If the thing lent is estimated between the lender and borrower, in order to adjust what the borrower shall restore; in case he do not restore the thing itself, he shall be accountable for this<sup>o</sup> value, although the thing should perish by an accident.<sup>p</sup> For he who lends in this manner does it that he may secure to himself, in all events, the recovery, either of the thing which he lends, or of the value, if the thing perishes.

## X.

583. *If the Borrower puts the Thing to another Use than that for which it was lent, he is accountable for Accidents.*— If the thing lent perishes by an accident, because the borrower put it to another use than that for which it was lent him, he shall be bound to make it good.<sup>q</sup>

## XI.

584. *Penalty for misusing the Thing.*— If the lender declares for what use he lends the thing, and for what time, his intention shall serve as a rule. And if nothing of this is mentioned, the borrower cannot employ the thing, but in the natural and ordinary use for which it is proper, and during the time that is necessary for the occasion for which it was lent. And if he puts it to any other use, contrary to the intention of the lender, or against his order, he commits a kind of theft: and he shall be bound to make good the losses and damages that happen thereupon.<sup>r</sup>

## XII.

585. *If the Thing is damaged either by the Use it is put to, or by the Fault of the Borrower.*— If the thing is damaged without any fault of the borrower, and by the bare effect of the use which he had a right to put it to, he is not bound to make good the damage; but if he is any way to blame for it, he ought to make it good.<sup>s</sup>

<sup>p</sup> L. 5, § 3, *D. commod.*; — l. 1, § 1, *D. de æstimat. act.*

<sup>q</sup> L. 18, *D. commod.*

<sup>r</sup> L. 5, § 7, *D. commod.*; — d. l. § 8; — § 9, *Inst. de oblig. quæ ex del. nasc.*; — l. 40, *D. de furt.*; — l. 15, *D. de precar.* See the eighth and following article of the first section.

<sup>s</sup> L. 10, *D. commod.*; — l. 18, § 1, *eod.*; — l. 3, § 1, *eod.*

## XIII.

586. *The Thing borrowed is not kept by Way of Compensation for a Debt.*—He who has borrowed a thing cannot keep it by way of compensation for what the lender may be indebted to him.<sup>a</sup>

## XIV.

587. *Expense laid out for the Use of the Thing.*—If, to make use of the thing borrowed, it is necessary to be at some expense, this falls to the share of the borrower.<sup>a</sup>

## SECTION III.

## OF THE ENGAGEMENTS OF THE LENDER.

## ART. I.

588. *He who has lent a Thing cannot take it back till after the Use.*—He who has lent a thing cannot take it back till it has served the use for which it was lent. For it was free for him not to have lent it; but having lent it, he is obliged, not only in common civility, but likewise by the effect of the contract, to suffer the thing to be employed to that use; for otherwise the loan, which ought to be a kindness, would prove an occasion of cheating and doing mischief.<sup>a</sup>

## II.

589. *How the Thing may be taken back, which is lent precariously.*—In the precarious loan, the lender may take back the thing before the use for which it was lent is served; for he did not lend it for a certain time; but, on the contrary, on condition that he might take it back when he pleased.<sup>b</sup> However, this is not to be extended to an indiscreet liberty of taking back the thing without any delay, and at an unseasonable time, which might occasion damage to him who was using it; but such a time ought to be allowed for restoring the thing as appears to be reasonable by the circumstances.<sup>c</sup>

<sup>a</sup> *L. ult. C. de commod.*

<sup>b</sup> See the fourth article of the following section.

<sup>c</sup> *L. 17, § 3, D. commod.; — d. § in f.*

<sup>b</sup> *L. 1, § 2, D. de prec.*

<sup>c</sup> *L. 10, § 3, D. de quest.; — l. 90, D. de rej. jur.; — l. 183, eod.*

## III.

590. *Of the Defects of the Thing lent.*—If the thing lent has any defect which may be of prejudice to the borrower, and if this defect was known to the lender, he shall be accountable for any damage that shall happen thereby to the borrower. As if to hold wine, or oil, he has lent vessels which he knew to be spoiled; if to prop up a building, he has lent timber which he knew to be rotten. For we lend to do service, and not to do mischief.<sup>a</sup>

## IV.

591. *Expenses laid out on the Thing borrowed.*—The expenses which are necessary in order to make use of the thing borrowed, such as the feeding and shoeing a horse that is lent, are due by the borrower. But if there happen any other charges, such as for curing a horse of some hurt, which he received without any fault of the borrower, the lender shall be bound to pay such expenses as these, unless they are so very inconsiderable, that the benefit which the borrower reaps from the use of the thing lent should oblige him to defray them.<sup>o</sup>

## TITLE VI.

OF THE LOAN OF MONEY, AND OTHER THINGS TO BE RESTORED IN KIND; AND OF USURY.

592. *The Origin of the Loan of Things which may be restored in Kind.*—We have seen, in the foregoing title, the manner in which men lend to others *gratis* those things whose nature is such that, after they have been used, they are capable of being restored, as we return a horse to the person of whom we borrowed him.

593. But there is another sort of things, whose nature is such that, after we have made use of them, it is not possible to restore them. For we cannot use them without consuming them, or putting them out of our possession. Of this kind are money, grain, liquors, and other things of the like nature. So that, to lend them,

<sup>a</sup> L. 18, § 3, *D. commod.*;—l. 17, § 3, *in fine, eod.* See the eighth article of the third section of *Lending and Hiring*.

<sup>o</sup> L. 18, § 2, *D. commod.*;—l. 8, *D. de pign. act.*

another kind of covenant is necessary; and this is the loan which we shall discourse of under this title.

594. *Two Characters of Things which are lent.* — To understand aright the nature of this loan, it is necessary to consider in this kind of things two characters, which distinguish them from all others; and which are the foundation of some distinctions that are necessary to be observed between this loan and the other contracts of which we have spoken.

595. The first of these characters is, that we cannot use money, corn, liquors, and other things of the like nature, but by ceasing to have them. And this is a natural effect of the providence of God, who, designing man for labor, has made these kinds of things so necessary to him, and has made them of such a nature, that they cannot be had but by labor, and that we cease to have them as soon as we use them; to the end that this want, which always returns, may oblige man to a labor which lasts as long as his life.

596. The second character which distinguishes these things from all others is, that whereas in other things it is very hard to find many of the same kind, which are perfectly like to one another, and which have the same value and the same qualities, we may easily in things of this kind find many that are exactly the same, both in value and in quality. Thus, all pistoles, all crowns, and all other pieces of money, have the same alloy, the same weight, the same stamp, the same value; and every one of them serves instead of all others of the same kind; and we may likewise make up the same sum in other species of coin. Thus we have grain for grain, liquors for liquors, of the same quality, and of the same measure, or of the same weight.

597. *The Nature of this Kind of Loan, and the Characters which distinguish it from the Loan of Things to be restored in Specie, and from other Contracts.* — These two characters of the things of this kind are the foundations of the commerce which is made of them by this sort of loan. For since we cannot have the use of them, and restore the same things, as we might have of a suit of hangings, a horse, or a book, we borrow them on condition to restore as much of the same kind; which is easy to be performed, since it depends wholly on counting, weighing, or measuring; and this is the covenant which we distinguish by the name of a loan of things to be restored in kind.

598. Thus we see that in our language the word *loan* is common to the loan of money, and to the loan of a horse; and that

although they are two sorts of covenants, whose natures are different, and which have also in the Latin tongue different names, yet we give indifferently to the one and the other the name only of loan; because both sorts have this in common, that the one lends to the other, on condition to have the same thing restored to him, if it be such as that the use of it does not consume it, or to receive another thing exactly like to what was lent, and which may serve instead of it, if the thing lent was such that it could not be used without being consumed or given away. But since, as has been remarked in the foregoing title, we must not confound these two kinds of covenants together, we have therefore thought proper to distinguish them by different names.

599. It appears from this use of the loan, which shall be the subject-matter of this title, what the nature of it is, and that it is a contract in which the lender gives a thing, on condition that the borrower shall restore to him, not the same thing in substance, but as much of the same kind. So that it is essential to this contract, that the thing lent should pass in such manner to the borrower, as that he may become master of it, in order to have a right to consume it. And it is from this use of this kind of loan, that we may discern what it has in common with sale, with exchange, with the loan of things to be restored in specie, and with letting and hiring; and what it is that distinguishes it from these other kinds of covenants.

600. It is common to sale, and to the loan of things to be restored in kind, that the thing is alienated; but in a sale it is alienated for a price; and in a loan it is given on condition to receive exactly such another.

601. It is common to exchange, and to this kind of loan, that one thing is given for another; but in exchange, it is in the difference of the things that the contractors find their conveniency, giving some different thing to one another reciprocally, and at the same time; whereas, in a loan, one gives on condition to have something again, not immediately, but some time after, and not a different thing, but a thing exactly like to that which was lent.

602. It is common to the loan of things to be restored in specie, and to the loan of things to be restored in kind, that a thing is lent gratis; \* but in the loan of things to be restored in specie, the

\* It is the nature of a loan to be free and gratuitous; and this truth, which is here supposed, shall be proved hereafter.

Borrower is only to use the thing, and to restore it after he has done with it; and in the loan of things to be restored in kind, the borrower is allowed to consume the thing, and to give to the lender another of the same kind and value.

603. It is common to the contract of letting and hiring, and to loan, that a thing is given to be used. But in letting and hiring the use of the thing is granted for a hire, and on condition that the same thing be restored; whereas, in this kind of loan, the use of the thing is granted without any other charge than that of restoring as much of the same kind.

604. It is common to these five sorts of covenants, that the parties covenanting do there treat of the things, only with a view to the use which may be made of them; but they treat about this use of the things in a very different manner. One way, which is proper to the loan of things to be restored in specie, and to letting and hiring, is where the contractors treat only of the bare use, and not of the property of the things; for in these contracts there is no alienation of the thing. The other way, which is peculiar to sale, to exchange, and to the loan of things to be restored in kind, is where the parties treat only of the bare property of the things, and where they are alienated without any regard to the use which shall be made of them, and in such a manner, that, although the thing should perish as soon as the contract is accomplished, and before it were possible for him who receives the thing to make any use of it, yet the contract would remain entire. Whereas the loan of things that are to be restored in specie and the contract of letting and hiring do not subsist, if the thing perishes before he who receives it has been able to use it; and the contract vanishes, if the thing perish. From whence it follows, that he who has taken a thing by sale, by exchange, or by a loan, which obliges him to restore it in kind, is become proprietor of the thing; and that when he uses it, it is his own thing that he uses. But in the loan of things to be restored in specie, and in letting and hiring, it is another man's thing that is used by the borrower and by the hirer.

605. *Use of the Remarks which have been made.*— We have made here all these remarks on the different natures of the things which are lent; either by a loan which obliges to make restitution in specie, or by a loan which obliges to a restitution in kind; upon the characters that are common to loan, and to other kinds of covenants, and upon those which distinguish them; in order to.

lay the foundations of the rules of loan, which shall be explained in this title.

606. And these remarks will likewise serve, together with others that shall be made hereafter, to discover what are the causes which render it unlawful to take interest for money lent; and why this interest, which is otherwise called usury, and which was suffered by the Roman law, is so little countenanced with us, that our laws punish usury as a very great crime. We give the name *usury* to every thing that the creditor, who has lent either money or provisions, or other things which are consumed by use, may receive over and above the value of the money or other thing which he lent.

607. *Of Usury, and the Causes which render it naturally unlawful.* — Although this matter of usury, being otherwise regulated by our laws than by the Roman law, be without the bounds of the design of this work; yet seeing it is an essential part of this kind of loan we are now treating of, and that the knowledge of it is of most frequent and necessary use, and that it hath its principles in the law of nature, we thought it not proper to omit it in this title of loan. But to keep to the method which we proposed, not to insert in the detail of the rules any others than such as are both agreeable to the Roman law, and to our usage, we shall blend what relates to usury with the particular rules of loan; and we shall mention here, at the head of this title, all that we shall think fit to say on this subject.

608. To establish the principles upon which we are to judge whether the interest of money lent be lawful or not, we need only have recourse to the authority of the divine law, which has condemned it, and forbid it in such strong and express terms. For whoever has common sense cannot but agree, that that is to be accounted unjust and unlawful which God condemns and prohibits.<sup>b</sup> But although it be his will alone which is the rule of justice, or rather which is justice itself, and which renders just and holy whatever he commands;<sup>c</sup> yet he suffers, and even requires, that man should consider and examine what that justice is, and that he should open his eyes to the light of it in order to know it.<sup>d</sup> If therefore we would discover what is the character of the iniquity which renders usury so criminal, before God, and which ought to make it so to us both in our hearts and minds we have only to

<sup>b</sup> *Eccles. xxxiii. 3.*

<sup>c</sup> *Psalm. xix. 9.*

<sup>d</sup> *Eccles. xvii. 24.*

consider what the nature of this contract of loan is, in order to judge whether it be just to take interest for it or not. And we shall easily perceive by the natural principles of the use which God has given to this contract in the society of men, that usury is a crime which violates these principles, and undermines the very foundations of the order of society.

609. The two ways of lending, whether it be that of the loan of things to be restored in specie, which has been treated of under the foregoing title, or the loan of things to be restored in kind, which is the subject of this title, derive their origin, as all the other covenants, from the order of society; and they are natural and essential to it. For it is essential to this order, where men are linked together by mutual love, and where every one has for a rule of the love which he owes to his neighbour that which he has for himself, that there should be ways whereby men may assist one another gratuitously, both with things and with their persons. And as there are covenants established for such commerces between them as are not gratuitous, so there ought also to be for such as are. Thus, seeing men may traffic with one another about the property and use of things, there are therefore covenants established for the said traffic; such as sale, exchange, and letting and hiring; which makes it to be of the nature of these covenants not to be free and gratuitous. Thus, seeing men may communicate to one another freely, and without any reward, both the property and use of things, there are therefore covenants by which they may acquire things in this manner, the nature of which is, for this reason, that they should be gratuitous, such as donation, and the loan of things to be restored in specie.\*

610. It is therefore certain, that there are two ways by which people may communicate to one another the use of things. One is gratuitous, and the other for a recompense, in such things where this commerce may be lawful. Thus, the owner of a horse may either let him out for a hire, or the price of the service which the said horse may render; or he may lend the use of him gratuitously, and without any reward. And these two sorts of covenants have their nature and characters different, which ought not to be confounded together.

611. It remains, therefore, in order to know whether we may take interest for the loan of money, or not, that we examine



whether, as there are two ways of giving the use of a horse, of a house, a suit of hangings, and other things of the like nature, one by the loan of things to be restored in specie, and without any recompense, and the other by letting it to hire for a certain price, and both the one and the other honest and lawful, there be likewise two ways of giving money, corn, liquors, and the other things of the like kind; one by a free gratuitous loan, and the other by letting them out for hire, or a gainful loan. So that, as it is indifferently just and natural that he who gives his horse should have his choice of saying that he either lends it, or that he lets it out, it may be likewise equally natural and just for him who gives his money, his corn, his oil, his wine, to have it in his choice to say that he lends it out upon interest, or without interest.

612. This is, without doubt, the point in question, which depends on the knowledge of the causes which justify the will of him, who, instead of lending his horse, will only let him out for a certain profit; and on the inquiry whether there be also causes which justify the will of him who will not lend his money, or his provisions, but on condition that he shall have interest for them. And in order to judge of this parallel, we must consider what it is that passes in the contract of letting and hiring, and likewise see what passes in the loan of money, or provisions.

613. In the hiring of a horse, a house, and other things, he who lets it out may justly stipulate the price of the service and use which he who hires the thing may reap from it, whilst he who is the owner of it ceases to enjoy it, and to make use of it; and he likewise has for a title to justify him in so doing, that sort of diminution, which, although it be insensible, does nevertheless happen to the thing that is hired.

614. In the lease of a farm, the lessor justly stipulates the price of the fruits, and other revenues, which may arise from the lands that are farmed out.

615. In undertakings of work to be done, and in the hire of laborers, it is but just that those who give their time and their pains should secure to themselves a salary for the labor out of which men are to get their livelihood.

616. We see, then, in all these sorts of commerce, that that which renders lawful the profit or the revenue that may be made by them is, that he who lets out to another either his labor, or his industry, or a horse, a house, a farm, or other thing, stipulates justly a price for the right which he gives another to enjoy, either

the produce of his labor, or the service of his horse, to dwell in his house, to reap the fruits of his lands, or to have the benefit of the other uses that may be made of the thing that is let out to hire. But although this agreement seems to be a just title for taking a salary, a hire, or other revenue, yet it would not be sufficient to justify the profit that is made by letting to hire, if it were not attended with the other characters that are essential to this contract, and which are such, that, if they were wanting, the covenant, for the profit to be made thereby, would be unjust. So that, although it were true that one might make such a stipulation for the interest of money, or provisions, in consideration of the advantage which the borrower might make of them, which cannot be, as shall be shown hereafter; yet the want of these other characters which are necessary to justify the profit that is made by letting and hiring would render the interest of money unlawful. And in order to judge of it, we are only to consider what those characters are which are to be found in letting and hiring, and not in a loan, and without which even the profit that is made by letting to hire would be unlawful.

617. In letting and hiring, it is necessary that he who hires the thing should be at liberty to make use of it, and enjoy it, according to the quality of the agreement; and if he were hindered from doing so by an accident, he would be discharged from the rent or hire. But in a loan, the borrower remains bound, whether he uses the thing that he has borrowed, or is hindered by some accident from using it.

618. In letting and hiring, the person who hires the thing is obliged only to restore the same thing which he has hired; and if it perishes in his hands by any accident, he is not answerable for it, and is not obliged to restore any thing. But in a loan of this kind, the borrower is obliged to restore the same sum, or the same quantity, which he had borrowed, although he should at the same time lose it by an accident.

619. In letting and hiring, the diminution, be it sensible or insensible, which happens to the thing that is let, by the use which is made of it by the person who has hired it, falls upon the owner, who had let it out. But in a loan of this kind, the lender suffers no diminution, nor bears any loss.

620. In letting and hiring, the lessee uses that which belongs to another; for he who lets a thing remains master of it; and if he were not, he would have no right to take a rent, or hire, for the

use of it. But in this kind of loan, the borrower becomes master of the thing that is lent him; and if he were not, he could not use it. So that when he makes use of it, it is his own thing that he uses; and the lender has no longer any right to it.

621. We see, by this parallel of the characters which distinguish the contract of letting and hiring from that of loan, what are in the contract of letting and hiring the natural causes which justify the profit which he makes who lets out his labor, his lands, or any other thing; and that, to render the rent or hire thereof lawful, it is necessary that he who lets out a thing should retain the property of it, and that he remaining master of the thing should bear the loss or diminution of it, if it perishes, or is diminished. And he must, moreover, warrant the enjoyment and use of the thing to him who hires it, and if this enjoyment should be interrupted, and cease, even although it were by an accident, he could not demand the rent or hire. Which makes the condition of the lessee such, that he is sure of enjoying the thing of another person, without being in danger of paying any thing for it if he does not enjoy it, and without the hazard of losing the thing if it perishes.

622. These are the natural foundations which render these sorts of commerce lawful, where one puts a thing into the hands of another person, for some gain or profit that accrues to both. And we see, on the contrary, that he who lends money, or provisions, upon interest, does not ascertain any profit to the borrower, and yet, nevertheless, secures to himself a certain gain; that he does not so much as warrant the use of the thing which he gives; and that, on the contrary, although the thing which he lends should happen to perish, the borrower shall, nevertheless, be bound to restore to him as much, and likewise the interest. So that he takes a sure profit, where the borrower can have only loss; that he takes profit of a thing that is not his own; and even of a thing which in its own nature yields no profit; but which can only be put to use by the industry of the borrower, and with the hazard both of the whole profit and capital, without the lender's contributing any share, either of the said industry, or of the loss.

623. We shall not enlarge any further on the consequences which follow from all these principles: and what has been said is sufficient to convince us, that usury is not only unjust, because of its being prohibited by the law of God, and because of its being contrary to charity, but that it is, moreover, naturally unlawful, as being a violation of the most just and most certain

principles of the nature of covenants, and which are the foundation of the justice of the profits that are made by all these sorts of commerce. So that it is not strange that usury should be looked on as so odious and so criminal a practice, and that it should be so rigorously condemned, both by divine and human laws, and so severely repressed, both by our religion and civil policy.

624. It would not be necessary, after these proofs of the iniquity of usury, to answer the objections that are brought by usurers, seeing it cannot be doubted that an unlawful commerce cannot be tolerated on any pretext whatsoever. And, besides, the law allows of none, and condemns all usury without distinction, and without having any regard to all the motives that are made use of to justify it, and to excuse it. But because the pretexts for usury, however unjust they may be, have this effect, that those who make use of them pretend that the general rule prohibiting usury admits of the exceptions which they would make to it, it is necessary to show, by the answers to these objections, and to those pretexts, that this rule admits of no exception whatsoever.

625. *First Pretext of Usurers, that they do a Kindness.* — All the pretexts of usurers centre in this, to say that they do a kindness; that they deprive themselves of the gain which they might make of their money, or other things which they may lend; and even that the loan occasions them loss. And, in fine, that the borrower makes profit by it, or reaps some other advantage from it.

626. *Answer.* — It is true, that to lend is to do a kindness, and this is the natural and essential character of the contract of loan. But it is for this very reason that we can lend only gratuitously, in the same manner as we can only make a gift, or bestow alms, without any recompense: And it would be very strange, that, by means of a contract, the essential use of which is to do a kindness, we should make merchandise of that very kindness. As, therefore, it would be against all order for him who makes a free gift, or bestows alms, to sell that favor which he does by giving; and it would not be any longer either a gift, or any alms; it is likewise contrary to order, that he who lends should sell his kindness. For, in a word, it is so essential to all manner of kindness that it should be gratuitous, that even in the covenants where one may lawfully receive a profit for doing a kindness, it cannot be the kindness itself which is turned into commerce. But every profit has some other cause. Thus, he who lets his house to one

who cannot find another does him a kindness; but he shall not for this reason be at liberty to take from this tenant, whom he is willing to oblige, a greater rent than he would take from one whom he did no ways intend to oblige by letting it; otherwise it might be said, that we may sell dearer to a friend than to a stranger, seeing we should sell to him with the circumstance of having a mind to oblige him, which we should not have in our thoughts if we sold to a stranger.

627. We cannot, therefore, make use of the pretext of doing a pleasure to excuse usury, but as a blind, and with intention to overthrow the order of the first laws, which enjoin us to do good only because they require us to love; and which do not suffer us to sell that love which they command every one to have in his heart towards his neighbour.

628. This truth, that a kindness cannot be bought and sold, is so natural, that by the Roman law, which allowed of usury, as shall be shown hereafter, a debtor could not even compensate with the interest which he owed a good office done to his creditor. And we have a remarkable instance of it in one of the laws of the Pandects,<sup>f</sup> where it is said, that, if one who is indebted in a sum of money, which of its own nature produces no interest, undertakes the management of the affairs of his creditor, in his absence, and without his knowledge, he is obliged to pay the interest of that sum, after the term of payment is expired, without any demand. And the good office which he renders is so far from being reckoned a compensation for that interest, that it is laid down as a rule in that law, that every good office which the debtor renders to his creditor, in taking care of his affairs, obliges him to demand that interest of himself, and to pay it, without retaining it as a compensation for the kindness he does him; because, as is mentioned in the same law, in relation to another kind of duty, those who do any office, or service, which in its nature ought to be free and gratuitous, ought to do it entirely, and without interest, and can take nothing for it.<sup>g</sup> And we see likewise in the Roman authors, who were no more enlightened with the spirit of the divine law, than those authors were from which the laws of the Pandects have been taken, that they were of opinion that it was essential to the nature of an act of kindness not to put it out to usury.<sup>h</sup>

<sup>f</sup> L. 38, D. de neg. gest.

<sup>h</sup> Cic. de Amicitia; — Terent. in Phormione.

<sup>g</sup> D. l. 38, D. de neg. gest.

629. *Second and Third Pretext, Loss, or Want of Gain.*—

*Answer.*—All the consequence, then, which the creditor who lends his money with this view can draw from this good intention of his to do a kindness is, that he ought to lend it gratis; and if the loan is not agreeable to him with this condition, which is inseparable from it, he has nothing to do but to keep his money, or put it to some other use. And he will not have reason to complain, either that the loan deprives him of a gain, or that it occasions him any loss. And this may serve as an answer to the objection made by those who say that by lending they cease to gain, or that they even lose, seeing they are at liberty not to lend; seeing the contract of loan was not invented for the benefit of those who lend, but for the convenience of those who borrow; and, in fine, that people may lay out their money in purchasing annuities, or employ it some other way besides that of lending it on interest; which can never become innocent under any pretext whatsoever, seeing there is none but what God has foreseen, and which his express prohibition of usury shows to be unwarrantable. Thus, we see that both the church and the state have prohibited usury by so many laws, not as a bare injustice, but as a great crime. For the councils and the canons do so severely repress usury, that they condemn, even as heretics, those who stand up in defence of it;<sup>1</sup> because that in effect it is an error against the spirit and first principles of the law of God. And the ordinances punish it so severely, that the penalty of usury in France is, for the first offence, an ignominious fine (which is called *l'amende honorable*) and banishment, and for the second offence, death. And by that law the usurer is to be hanged, although he should allege in his defence that by lending his money he ceased to gain, or that even he sustained some loss or damage thereby.

630. *Fourth Pretext, the Profit of the Borrower.*—*Answer.*—

The pretext of the profit which the borrower may make of the money which he borrows, is of no greater consideration in the eye of the law, than the other pretexts before mentioned; and it likewise is nothing else but an illusion; seeing this profit, if any were to be made by the borrower, could not be a sufficient title to justify the lender's taking interest. For it is the rule touching future profits, that, to be entitled to a share of them, one ought to

<sup>1</sup> Can. 1, 4, 5, D. 47, *toto tit. de usur.*; — Clem. *de usur.*

<sup>1</sup> Ordinance of Blois, art. 202.

run a hazard of the losses which may happen, instead of the profits which were hoped for. And the condition of being entitled to a share of a future gain implies that of not profiting, unless there be gain made, and even of losing, in case any loss does happen.<sup>m</sup> One cannot, therefore, without breach of humanity, nor even without a crime, discharge himself from the loss, and ascertain to himself a gain. To which we must add what has been said touching the causes which justify the taking of profit.

631. *Iniquity of Usury.*—There remains, then, no other title for the justification of usury, besides the covetousness of the lender, and the necessity of the borrower. And it is likewise the combination of these two different kinds of evils which has been the occasion and the source of the commerce of usurers. So that whereas the divine providence forms the conjuncture which brings the person who is in want near to him who is able to relieve him, that the sight of the necessity of the one may dispose the other to exercise his charity or humanity,<sup>n</sup> the usurer makes of this conjuncture a snare; according to the Scripture phrase, he lies in wait, to make a prey of those who fall into it.<sup>o</sup>

632. *Bad Consequences of Usury.*—We shall not dwell upon the other characters of the iniquity that is to be found in usury, such as idleness,<sup>p</sup> which it leads the usurer into, by reason of the facility of making profit without industry, without hazard, and without trouble; the liberty which the lender has to take his interest immediately, and to demand his principal whenever he pleases; and the slavery<sup>q</sup> into which usury brings the debtor, under the burden of paying always to no purpose, and of seeing himself exposed every moment to repay the whole at an unreasonable time, which may prove his ruin. Neither shall we enlarge any further on the detail of the inconveniences of usury in trade, and the troubles and other evils which it occasions to the public. They are sufficiently known by experience; and it is easy to imagine, that a crime which extinguishes the spirit of the first laws, and which by that means destroys the very foundations of

<sup>m</sup> L. 10, *D. de reg. jur.* See the instance given in l. ult. § 3, *Cod. de furt.*, and of l. 13, § 1, *D. commod.*

<sup>n</sup> *Prov.* xxii. 2; xxix. 13;—*Eccles.* xvii. 14.

<sup>o</sup> *Psal.* x. 8, 9.

<sup>p</sup> Vivant omnes Judæi de laboribus manuum suarum, vel negotiationibus sine terminis, vel usurant. *St. Louis*, 1254. In omnibus fere locis, ita crimen usurarum invaluit, ut (aliis negotiis prætermisiss) quasi licite usuras exerceant. *Cod. l. 3, de usur.*

<sup>q</sup> The borrower is servant to the lender. *Prov.* xxii. 7.

society, raises troubles and disorders in it; and troubles of such dangerous consequence; that we know that at Rome usury was the occasion of many seditions;<sup>a</sup> and it is upon this account that our laws have extended the punishment of usurers even to death.

633. *Prohibitions of Usury in the Law and the Prophets.*—*Usury forbidden at Rome.*—These several evils which are occasioned by usury, and the characters of iniquity which are discovered in it by the principles of the law of nature, are just causes of the prohibition of it by the law of God.<sup>b</sup> And we cannot doubt of usury's being a great crime, when the prophets call it an abomination, and place it in the same rank with idolatry, adultery, and other great crimes.<sup>c</sup> Which plainly shows, that usury is contrary to the spirit of the law of nature. For if there were no greater difference between lending one's money without interest, or upon interest, than there is between lending a horse and letting him to hire, it would be impious and absurd to imagine that the law of God, which does not forbid the taking hire for a thing that is let out, should have forbidden the taking interest for money lent, and should have placed it in the number of the most enormous crimes. So that it must necessarily be, that the law of nature, which is not transgressed by letting and hiring, is so by usury: and it is so in reality in all the several ways that have been mentioned, and which render usury so contrary to humanity, and give it a character of iniquity so naturally sensible, that it has made it odious even to those nations which were ignorant of the first laws:<sup>d</sup> for it was prohibited at Rome in the first ages of the commonwealth, and long before the gospel was known there; and it was even more rigorously prohibited than theft. Since, whereas the punishment of theft was only the double of the thing stolen, that of usury was the quadruple.<sup>e</sup> Thus usury was looked upon among the Romans as a very pernicious crime; and thus we likewise see that an eminent Roman, being one day asked what he thought of usury, made no other answer to the person who asked him the question, than by asking him again

<sup>a</sup> Sane vetus urbi funebre malum; et seditionum, discordiarumque creberrima causa. Tacit. 6 Annal. Anno Urbis 786.

<sup>b</sup> Lev. xiv. 35, 36, 37; — Deut. xxiii. 19, 20; — 2 Esdr. v. 7.

<sup>c</sup> Psal. xv. 1, 6; — Ezek. xviii. 8, 9, 11, 12, 13; x. 17; xxii. 12.

<sup>d</sup> Cic. lib. 1, de Offic.

<sup>e</sup> Mart. Cato de Re Rust.; — Tacitus 6 Annalium, Anno Urbis 786.



what he thought of murder.<sup>a</sup> And the author who has taken notice of this answer has said, in another place, that usury kills.<sup>a</sup> We know, likewise, that another author, of greater antiquity, in raillery, makes one who wanted money to say, that, if he could not get any to borrow, he would take some upon interest; to show that it is contrary to the nature of loan to take interest for it.<sup>a</sup>

634. *Objection from the Liberty granted to the Jews to lend upon Usury to other Nations.* — It may be objected by some, as to the prohibitions of usury by the law of God, that they were made only for the Jews among themselves, but that they were at liberty to lend upon usury to strangers;<sup>b</sup> and that usury is not expressly prohibited by the gospel; in order to infer from thence, that it is not unlawful by the law of nature: and it may be likewise imagined, with respect to that ancient law among the Romans, that it was afterwards abolished, and that usury was afterwards permitted at Rome, as appears both from the digest and the code. And it will not be amiss to give an answer to these last difficulties, for the satisfaction of those who may not so readily perceive the answers to them, although they be easy to be understood.

635. *Answer.* — It is true, that the law of God, which forbade usury to the Jews, allowed them to lend upon usury to strangers. But we must not divide the law against itself; and this liberty cannot change the idea which God gives us of usury, both in the law itself, and likewise by the prophets. For seeing they tell us that usury is an abomination, it is necessary that this truth should remain inviolable; and that this liberty granted to the Jews should not be contrary to it. And in fact it is not contrary to it, as will appear from the remark we shall make on two truths which we learn from the same law, and from the gospel, and which plainly show that this liberty which was given to the Jews to lend upon usury to strangers is no ways inconsistent with the divine prohibition of usury; and that this prohibition is still in greater force under the new law.

636. The first of these truths is, that the law was given to a people chosen from among all other nations;<sup>c</sup> and who, at the time that this law was given them, did live in the midst of other

<sup>a</sup> Cic. lib. 2, de Off. in fine.

<sup>b</sup> Plaut. in Asinaria.

<sup>c</sup> Deut. vii. 6.

<sup>a</sup> Cic. pro Calpio.

<sup>b</sup> Deut. xxiii. 19, 20.

nations, whom they were commanded to look upon as enemies, whom they were to destroy without mercy,<sup>d</sup> for fear lest those who composed the elect people should cease to look upon those strangers as enemies to God and them, and should enter into such ties and engagements with them, as to be drawn over to their idolatry and their other crimes.\*

637. The bare reflection on this first truth is sufficient to warrant our drawing this inference from it, that the liberty under the old law of lending upon usury to strangers, joined with the prohibition of usury among the Jews themselves, proves nothing else but a divine dispensation to take usury from those nations whom they were to consider as enemies, and to exterminate from off the earth; and that this liberty was of the same nature and character with the command that was given to the same people, when they went out of Egypt, to borrow and carry away with them the most precious movables of the Egyptians.<sup>e</sup> And as this commandment does not prove that it is lawful to steal, and does not hinder theft from being a crime contrary to the law of nature, so the liberty of taking usury in the like circumstances does not prove that usury is not such as God describes it, both in his written law, and by the law which he has engraven on the mind of man, and which the heathens themselves were not ignorant of.

638. The other truth which is to be observed is, that the divine law was given to a stiff-necked and ignorant people,<sup>f</sup> and who, because of their stubbornness, were indulged by the same law in some things which were prohibited enough by the law of nature. Thus, for example, that written law tolerated divorce, and permitted it,<sup>g</sup> although contrary to the law of nature, and to that strict union which God himself has formed between the husband and wife; and of which it is said, that it is not lawful for man to put them asunder.<sup>h</sup> And as the permission of divorce under the ancient law would be a very false principle to justify it now-a-days, so likewise that which was given to the Jews to lend upon usury to strangers cannot be looked upon by us as a rule since the publication of the gospel. For in the same manner as nobody doubts now that divorce is unlawful, and that it is a truth,

<sup>d</sup> Deut. vii. 2.

<sup>e</sup> Exod. xxiii. 24, 33; — Deut. vii. 4; — 1 Kings xi. 2; — Exod. xxxiv. 13.

<sup>f</sup> Exod. xi. 2, and xii. 35.

<sup>g</sup> Exod. xxxii. 9; — Deut. ix. 6.

<sup>h</sup> Deut. xxiv. 1.

<sup>i</sup> Matt. xix. 5, 8; — Gen. ii. 23.

and a rule both of the law of nature and the revealed law of God, that marriage is indissoluble; so likewise we can no more doubt but that usury is a crime against the law of nature, and against the law of God; and that the toleration of usury with regard to strangers is abolished by the gospel, as well as the permission of divorce; seeing it is certain under the new law, by which truth is unveiled, and divested of the types and figures of the old law,<sup>1</sup> that there are now no people rejected, or distinguished in the sight of God;<sup>m</sup> that the Samaritan is become neighbour to the Jew;<sup>n</sup> and that now there is no distinction of Jew and Greek, nor of other stranger, seeing they are all of them called to the new law, and are united to it under the obedience of their common Lord.<sup>o</sup> So that the liberty to lend upon usury to strangers cannot subsist for those to whom nobody is any more a stranger, and who are commanded to look upon all men, of what nation soever, without distinction, as their brethren. And we may likewise add to these truths, that even before the gospel the prophets who prepared the minds of the people to receive the new law condemned usury, without distinguishing between brothers and strangers, as appears from the passages that have been quoted.

639. *Another Objection that the Gospel has not forbidden Usury.*

— *Answer.* — As to the gospel, it is said that usury is not there prohibited, because in one place where our Saviour Jesus Christ hath spoken of loan, he has not there in express terms forbidden the taking of interest; but has only said, that we must lend without hopes even of receiving back what we have lent.<sup>p</sup> The consequence would be much better and more natural to conclude from the said passage, that, Jesus Christ having commanded his disciples to lend, even with the danger of losing, on such occasions where charity does require it, in the same manner as he has commanded them to give alms, it is natural to infer from thence, that it is much more his will and pleasure that they should not take any more than what they have lent. And if it were true that he had permitted usury, what he has said himself would not be true, that he was come to give the law its perfection, and its final accomplishment, and not to abolish it;<sup>q</sup> seeing he would have abolished the prohibition of usury, and permitted what the law

<sup>1</sup> 1 Cor. x. 11.

<sup>m</sup> Luke x. 36.

<sup>n</sup> Rom. x. 12; — Gal. iii. 28; — Rom. iii. 29, and xv. 10; — Acts x. 28, 35.

<sup>p</sup> Luke iii. 6.

<sup>q</sup> Acts x. 35; — Rom. iii. 29, and xv. 10.

<sup>r</sup> Matt. v. 17.

had prohibited as a very great crime, and one of those that are most contrary to charity.

640. If it be therefore true, that we dare not so much as have a thought that Jesus Christ has said any thing contrary to truth, we must acknowledge that this saying alone, that he is come to perfect the law, implies the prohibition of usury as much as that prohibition is contained in all those most holy and refined precepts which he has given us, in order to dissuade us from setting our affections on earthly things. And we cannot be of opinion that he has permitted the great liberty of usury, without being guilty of an impiety which comes very near to blasphemy. For it is nothing less than blasphemy against the divine sanctity of Jesus Christ to say, that he who is come to give the law its perfection has been more indulgent in the matter of usury than was even that law which he came to perfect; and that that divine lawgiver, of whom it had been foretold, that he would deliver his people both from usury and all other iniquity,\* and that he was to wear men from setting their affections on the things of this world, should countenance covetousness to that excess, as to suffer a commerce which the old law and the prophets had condemned as a most heinous crime, and which is so directly opposite to the principles of his gospel.

641. *Another Objection.—Liberty of Usury under the Roman Law.—Answer.*—As to the liberty of taking usury granted by the Roman law, that is an authority which can no ways counter-balance that of the law of God, nor that of the councils, and the ordinances of our kings, which condemn usury and punish it. But we may say, moreover, that this liberty of usury mentioned in the books of the Roman law is no other than a relaxation of the prohibitions that had been made of it, as has been already observed. So that what we see concerning usury in those books is no more than a condescension to an evil, which had got the better of all the remedies used to prevent it, and an abuse which passed for a just title, and which went even to that excess, that we see in one of the laws of the digest,\* that it was a lawful covenant to stipulate, not only interest from the time of the loan to the time of payment, but even to stipulate over and above a larger interest, if the debtor should fail to pay at the time appointed.

642. But we may say, further, that this liberty of usury under the Roman law was unjust, even according to the principles of those very lawyers who did justify it. For we see in a law that is taken from one of the most eminent among them, that the gain made by usury is not natural. *Usura non naturâ pervenit, sed jure percipitur. L. 62, D. de rei vind. Usura pecuniæ, quam percipimus, in fructu non est: quia non ex ipso corpore, sed ex aliâ causâ est, id est, novâ obligatione. L. 121, D. de verb. signif.* And what is added in the law 62, *D. de rei vind.*, that usury which is not a natural profit is exacted by virtue of a right, does not signify that it was due by any law; but that right was a stipulation which they thought sufficient to justify their taking of usury, although they themselves were of opinion that a bare paction was not sufficient for that purpose.<sup>†</sup> Which plainly shows, that they knew of no other title to warrant their taking of usury, besides the formality of a stipulation. As if usury, which they knew to be naturally unlawful, and such as could not even be demanded by virtue of any paction, were become lawful by the bare pronounciation of the words which made the stipulation.

643. *Usury unlawful without Exception.* — All these proofs, which show that usury is not only unlawful, but that it is a crime, do likewise sufficiently evince, that there is no case wherein it is lawful; and that every covenant, or commerce, whereby interest is taken for a loan, whatever pretext is made use of to color it, is a criminal usury, most piously condemned by the law of God, and that of the church, and most justly punished by the ordinances.

644. These prohibitions of usury in general, that is to say, of taking any interest at all for a loan, reach even to all sorts of usurious contracts, such as mortgages or pawns, where the creditor is to receive out of the revenue of the thing mortgaged or pawned more than the laws allow him to take for the money lent, and other contracts, where they color usury under the appearance of a lawful contract. We shall not explain under this title the rules of these sorts of contracts, and the characters which may distinguish usurious contracts from those which are not;<sup>‡</sup> because our rules touching this matter are different from those of the Roman law, by which it was lawful to lend upon usury, and even to take, in-

<sup>†</sup> L. 3, *Cod. de usur.*; — l. 24, *D. de præscr. verb.*

<sup>‡</sup> See the first section of the title of *Interest*.

stead of interest, lands to be enjoyed till the payment of the debt, although the revenue of the said lands might be of much greater value than the interest of the money lent.\*

645. *Interest lawful after the Term, and a Judicial Demand of it.* — It is not necessary to acquaint the reader, that under the prohibitions of usury we are not to take in the cases where, the borrower not paying at the time appointed, the creditor demands payment of his money judicially, with interest for the delay of payment after the demand. For then the lender not being any longer obliged to grant a new delay, it is but just that he should have interest to indemnify him for the loss he sustains by the injustice of the debtor, who fails to pay at the time appointed. But this interest hath nothing in it like to that which the creditor takes before the demand, whether it be that the debtor consents to it voluntarily, or that the creditor exacts it otherwise.

646. *Contracts in Relation to Annuities.* — Neither is it necessary to observe here, that we are not to comprehend under usury the contracts in relation to annuities. For there is this essential difference between a loan and an annuity, that, whereas in a loan the debtor may be compelled to pay the principal sum at the term, he who owes an annuity may keep the principal as long as he pleases, paying the annuity. And, moreover, the contract of an annuity is a real sale, which he who takes the money on this score makes; for he sells in effect a certain revenue out of his whole estate, in consideration of a price.

## SECTION I.

OF THE NATURE OF THE LOAN OF THINGS TO BE RESTORED IN KIND.

### ART. I.

647. *Definition of this Kind of Loan.* — The loan of things to be restored in kind is a covenant by which one gives to another a certain quantity of those kinds of things that are given by number, weight, or measure; such as money, corn, wine, and other things of the like nature, on condition that, since one ceases to

\* L. 17, *Cod. de usur.*

have such things in his possession whenever he uses them, the borrower shall restore, not the same individual thing he borrowed; but as much of the same kind, and of the like quality.<sup>a</sup>

## II.

648. *The Thing is alienated.*—In this kind of loan, the thing lent is alienated, and the borrower becomes proprietor of it; for otherwise he would have no right to consume it.<sup>b</sup>

## III.

649. *Definition of Creditor and Debtor.*—He who lends such things as are consumed by use is called creditor, because of the credit he gives to the promise of the person to whom he lends; and he who borrows is called debtor, because he is bound to restore the same sum, or the same quantity, which he has borrowed. But persons may likewise become debtor and creditor for other causes besides that of loan; because there are other ways of being indebted, as well as by borrowing. Thus, in a sale where the price is payable at a certain term, the seller is creditor as to the price, and the buyer is debtor of it. Thus, in letting and hiring, the proprietor is creditor of the rent or hire, and the tenant is debtor of it.<sup>c</sup>

## IV.

650. *What Things may be lent in this Manner.*—We may lend in this manner of loan all things that are of such a nature that they may be repaid in kind, in the same quantity, and of the same quality. Thus, besides money, corn, wine, and other grain and liquors, we may likewise lend gold or silver in bullion, copper, iron, and other metals, silk, wool, leather, sand, lime, plaster, and all other things which may be repaid in kind, without difference of quantity and quality, in such a manner as that which is restored to the lender may entirely supply the place of that which was lent.<sup>d</sup> Thus, on the contrary, we do not lend after this manner beasts and other things, which, although they be of the same kind, yet every individual of the kind differs so much from another

<sup>a</sup> *Inst. quib. mod. re contr. obl.*; —l. 2, §§ 1 et 2, *D. de reb. cred.*; —l. 1, *D. de usufr. acc. rer. que us. cons. vel min.*; —d. l. 2, *D. de reb. cred.*

<sup>b</sup> *Inst. quib. mod. re contr. obl.* See the first article of the second section.

<sup>c</sup> *L. 11, D. de verb. sign.*; —l. 10, *ead.*; —l. 1, *D. de reb. cred.*; —l. 2, § 3, *ead.*

<sup>d</sup> *Inst. quib. mod. re contr. obl.*; —l. 2, § 1, *D. de reb. cred.*

in quality, that the creditor cannot be compelled against his will to take in payment one thing for another.\*

## V.

651. *Delivery necessary in the Loan to form the Engagement.*—In the contract of loan, the borrower obliging himself to restore a sum of money, or a certain quantity, equal to what he has borrowed; this contract is of the number of those where the obligation is not formed but by the delivery of the thing for which the borrower obliges himself.<sup>f</sup>

## VI.

652. *Why all Obligations are converted into that of Loan.*—Since money makes the price of all things that are vendible, and it is often necessary to reduce into money the value of the things which one owes to another, it is frequent and natural to convert into an obligation of loan those which proceed from other causes that are quite different. Thus, for example, when persons make up their accounts of sums of money, or other things, with which they supplied one another, when they agree their differences by transactions, and in other cases of the like nature, if he who is found to be debtor by the balance of the account, by the transaction, or by other causes, does not pay in ready money that which he owes, he binds himself by an obligation of loan, because what he owes is estimated in money, and he becomes debtor for it, in the same manner as if he had borrowed the sum of money that is equivalent to the thing which he was to have given.<sup>g</sup>

## VII.

653. *The Obligation of a Loan cannot exceed the Thing lent.*—The creditor may stipulate with the debtor for less than what he has lent, but not for more. For he may give, but not take too much. And if it should appear that an obligation were for a greater sum than that which had been lent, it would be null as to the overplus, that being without a cause.<sup>h</sup>

\* D. l. 2, § 1, in f. D. de reb. cred.

<sup>f</sup> Inst. quib. mod. re contr. obl. See the ninth article of the first section of *Covenants*.

<sup>g</sup> L. 42, D. de fidejuss. et mand.;—l. 3, § 3, D. de senat. Maced.;—l. 5, § 18, D. de tribut. act.

<sup>h</sup> L. 11, § 1, D. de reb. cred. See the fifth article of the first section of *Covenants*.



## VIII.

654. *Of the Change of the Value of Money.*—In the loan of money, the debtor is obliged only to repay the same sum; and if it happens that after the loan the species rises in value, he is not bound to pay the present value of the species which he received, but only so much as they were worth when he borrowed them. And if, on the contrary, the value of the species is diminished, the debtor nevertheless is bound to pay the sum he borrowed.<sup>1</sup>

## IX.

655. *Of the Change of the Value of Provisions.*—In the loan of corn, wine, and other things of the like nature, whereof the price rises or falls, the debtor owes the same quantity which he has borrowed, and neither more nor less, whether the price be risen or fallen.<sup>1</sup> Unless it be that, in the case of augmentation of the price, it should appear by the circumstances that the creditor had made an usurious loan; as those do, for example, who in the time of harvest lend their corn, which is then at a low price, that they may receive the same quantity in another season, when it will be dearer.

## X.

656. *A Loan in Appearance, which is a Sale.*—If one gives money to receive corn, or other things of the like nature, or gives these kinds of things to receive money, it is not a loan, but a sale, lawful or unlawful, according to the circumstances.<sup>2</sup>

## XI.

657. *A Thing given to be sold, in Order to lend the Price of it.*—If one of whom another desires to borrow money gives him gold, or silver plate, or any other thing, to sell, that he may keep the price, as money lent; he who has taken it will become debtor on the score of loan, till after the sale is made. But if the thing perishes in his hands before the sale, by an accident, the loss will fall upon him, because the thing was given him for his benefit. But if the owner of the said plate had a design to sell it, however, and prevented the borrower's request, by asking him to take the trouble of selling the said plate, and promising him, as an encouragement, to let him

<sup>1</sup> L. 2, § 1, D. de reb. cred.; — l. 3, in f. D. de reb. cred.

<sup>2</sup> L. 2, D. de reb. cred.; — l. 6, in f. D. eod. See the fifth article of the third section.

<sup>3</sup> This is a consequence of the nature of loan, and of that of sale.

keep the price, as money lent; then in that case if the thing perishes by an accident before the sale, the loss will fall upon the owner; for it was for his own interest that he gave the thing.<sup>a</sup>

## XII.

658. *Money deposited in Order to be lent.* — If he who borrows with a design to purchase, or to lay out the money some other way, takes the money into his keeping, on condition that the loan shall not be contracted till the purchase is made, or the money be otherwise employed, and it happens that the money is lost by some accident, this person with whom it was deposited will be answerable for it, in the same manner as if the loan were consummated, because it was for his behoof that the money was left with him.<sup>o</sup>

## SECTION II.

## OF THE ENGAGEMENTS OF THE LENDER.

## ART. I.

659. *The Lender ought to be Owner of the Thing, that he may transfer the Property to the Borrower.* — The first engagement of one that lends things to be restored in kind is, that he be owner of the thing which he lends, in order to transfer the same right to the borrower. For people borrow these kinds of things for no other end but to use them as their own, and to have the liberty of consuming them.<sup>a</sup>

## II.

660. *If the Thing lent belongs to a Third Person.* — If the lender is not owner of the thing which he lends, he does not convey the property to the borrower. And if he who is the true owner of the thing finds it in being, and claims it as his own, and proves his right to it, the borrower shall have his recourse against the lender, and recover damages of him.<sup>b</sup>

<sup>a</sup> L. 11, D. de reb. cred.; — l. 4, eod. See the following article.

<sup>o</sup> L. 4, D. de reb. cred.

<sup>a</sup> L. 2, § 4, D. de reb. cred.; — Inst. quib. mod. re-contr. obl.; — d. l. 2, § 2, D. de reb. cred. See the following article.

<sup>b</sup> L. 10, D. de reb. cred.; — v. l. 13, init. et § 1, eod. See the sixth article of the tenth section of the Contract of Sale.

## III.

661. *Redhibition in Loan.*—The second engagement of the lender is, to give the thing such that it be fit for its use. For it is for this use that it is borrowed. Thus, he ought to give money that is neither counterfeited nor cried down, and corn, or liquors, that are not spoiled or sophisticated. And he is to warrant them against all these defects, according to the rules explained in the eleventh section of the *Contract of Sale*.<sup>a</sup>

## IV.

662. *The Lender can ask no more than what he has lent.*—The third engagement of the lender is, not to exact any thing either in value or quantity over and above what he has lent.<sup>d</sup>

## V.

663. *Payment of a Part of the Debt which is not controverted.*—If the debtor of a sum of money, or of any other thing, contests with some reason a part of the debt, and offers to pay the overplus, the judge may oblige the creditor to receive payment of that part which is not controverted; for the judge is bound in humanity, and by virtue of his office, to lessen the occasions of lawsuits.<sup>e</sup>

## SECTION III.

## OF THE ENGAGEMENTS OF THE BORROWER.

## ART. I.

664. *Payment at the Term.*—The first engagement of the borrower is to repay the same sum, or the same quantity, which he has borrowed, and to pay it at term agreed on.<sup>a</sup>

## II.

665. *Accidents do not discharge the Debtor.*—Although the thing lent has perished by an accident, such as fire, shipwreck, or

<sup>a</sup> This is a consequence of the nature of loan, where a thing is borrowed only for its use.

<sup>d</sup> L. 11, § 1, *D. de reb. cred.*

<sup>e</sup> L. 21, *D. de reb. cred.* Although this rule is but little observed, yet we have nevertheless inserted it here in the sense explained in the article. For it is highly equitable, and it is just to observe it according to the circumstances.

<sup>a</sup> *Inst. quib. mod. re contr. obl.*; — l. 1, § 2, *D. de edendo*.

the incursion of an enemy, before the borrower could make use of it, he is nevertheless bound to restore as much; because he was made master of it by the loan; and it is he that ought to bear the loss.<sup>b</sup>

## III.

666. *Interest due after the Term, and legal Demand.* — If he who has borrowed money fails to pay it at the term, he will be bound to pay interest from the time that a legal demand of it has been made,<sup>c</sup> that the creditor may be indemnified for the loss he sustains by the delay.

## IV.

667. *Payment of the Value of the Things lent.* — If he who has borrowed other things than money does not repay them at the term, or does not give them such as they ought to be, he shall pay the value of them.<sup>d</sup>

## V.

668. *Time and Place of the Estimation of Things lent.* — The estimation of a thing lent, which the debtor delays to pay after the term, such as wine, corn, and other things, is made according to the price of that commodity at the time when and place where it ought to be delivered, because it was due at that time, and in that place. And if the time and place were not regulated by the covenant, the estimation will be made according to the price which the thing bears at the time and place where it is demanded.<sup>e</sup> Unless it be that the circumstances of the case, and the presumptions of the intention of the contractors, should require this estimation to be regulated on another foot.<sup>f</sup>

## VI.

669. *Payment in the same Quantity and Quality.* — He who has borrowed corn, wine, or other things of the like nature, without having them estimated at a certain price, which would make a sale, ought to restore corn, wine, and the other things, not only in

<sup>b</sup> § 2, *Inst. quib. mod. re contr. obl.*; — l. 11, *C. si cert. pet.*

<sup>c</sup> *L. 32, D. de usur.* See the fifth article of the first section of the title of *Interest*.

<sup>d</sup> *L. ult. D. de conduct. tritic.*

<sup>e</sup> *L. 22, D. de reb. cred.*

<sup>f</sup> See the ninth article of the first section.

the same quantity, but of the like quality with those which he had received.<sup>a</sup>

## VII.

670. *Interest of the Value of the Thing lent.*— If he who owes these kinds of things does not pay them at the term, or their value, he will be liable for the interest of them on the foot of their estimation, reckoning from the time that the creditor made a legal demand of them.<sup>b</sup>

## VIII.

671. *Interest of Interest Unlawful.*— The debtor by a contract of loan can never owe interest for the interest which he is in arrears of to his creditor.<sup>c</sup>

# SECTION IV.

## OF THE PROHIBITIONS TO LEND MONEY TO SONS LIVING UNDER THE PATERNAL JURISDICTION,

672. *Causes of these Prohibitions.*— The lending of money to sons who are still under the power and tuition of their fathers, being to them an occasion of debauchery, is one of the pernicious effects of usury. And it was by reason of the facility of borrowing money of usurers, that the corruption of the manners of the youth in Rome was come to such height, and attended with such consequences, that, to restrain this disorder, a regulation was made by a decree of the senate,—called the Macedonian decree, from the name of the usurer who gave occasion to it,—by which all obligations of sons living under the paternal jurisdiction, contracted by the loan of money, were declared null, without any distinction. And if any creditor had lent money for a cause that was just and reasonable, sufficient to support the equity of the obligation, it was by a favorable interpretation of the decree of the senate, that this case was to be excepted from the general prohibition, according

<sup>a</sup> L. 3, D. de reb. cred.; — Inst. quib. mod. re contr. obl.

<sup>b</sup> See the third article of this section; and the first section of the title of *Interest*.

<sup>c</sup> L. 28, Cod. de usur. It is the same thing as to the interest due for other causes. See the general rule in the title of *Interest*, Sect. 1, art. 10 and 11.

to the quality of the use to which the son put the money which he had borrowed.

673. But because the lending of money in general to sons that are under the paternal jurisdiction is not unlawful in itself, and becomes unjust only by the circumstances of the bad use to which they put the money; the general prohibitions of lending money to those who are under the tuition of their parents, not being part of the law of nature, but only a positive law of the commonwealth of Rome, have not the force of a law in France. And it is not agreeable to the usage with us, to annul without distinction, as that decree of the senate did, all the obligations of loan to sons living under the power of their fathers, but only those where the loan is an occasion of debauchery; and it depends on the prudence of the judges to distinguish them according to their circumstances. The rules, therefore, which shall be laid down in this section, are to be considered as principles of equity, which may be applied by the judge according as he sees proper.

674. It is necessary to remark on this subject of lending money to sons living under the jurisdiction of their fathers, that this regulation respects not only sons who are minors, for their minority alone would be sufficient to annul the obligation; but that it extends to those who, being of full age, are still under the paternal jurisdiction, not having been emancipated.\* See the fifth and sixth articles of the second section of the title of *Persons*.

#### ART.

675. *In what Manner it is forbidden to lend Money to Sons living under the Paternal Jurisdiction.* — Those who lend money to sons living under their father's jurisdiction, without a just cause, and only to assist them in their debauchery, cannot demand what they have lent in this manner.<sup>a</sup> And it would be the same thing, if, instead of lending money, the lender had disguised the obligation under the color of another contract,<sup>b</sup> or lent other things than money.<sup>c</sup> And it is by the circumstances that we ought to judge of the motive of the loan, and whether it ought to subsist, or be annulled.<sup>d</sup>

<sup>a</sup> L. 1, *D. de senat. Maced.*

<sup>b</sup> L. 3. § 3, *D. de senat. Maced.*

<sup>c</sup> L. 7, § 3.

<sup>d</sup> Touching the lawful causes of lending money to sons living under the paternal jurisdiction, see the said law 7, §§ 13 and 14.

## II.

676. *The Death of the Father does not validate the Loan made to the Son.* — The obligation of sons living under the paternal jurisdiction, which is liable to be vacated by reason of the vice of the motive of the loan, will not be validated by the death of the father.<sup>a</sup> For it was vicious in its origin, and it is not so much in favor of the son that it is annulled, as out of hatred to the creditor, who had made an unlawful loan.<sup>f</sup>

## III.

677. *It is not forbidden to lend Money to a Son that is emancipated.* — After the son is emancipated from the father's jurisdiction, these prohibitions cease, and his obligation subsists, without any inquiry into the motives of the loan.<sup>g</sup> And it would be the same thing, if he who was not really emancipated did act so as to be publicly reputed master of his own concerns.<sup>h</sup>

## IV.

678. *If the Obligation of the Son has been acquitted or approved.* — If the father has approved or ratified the obligation, if he pays a part of it, or if the son acquits it himself, the obligation or the payment cannot afterwards be revoked.<sup>i</sup>

## TITLE VII.

## OF A DEPOSIT, AND OF SEQUESTRATION.

679. *Use of Deposit.* — It happens often, that the owners or possessors of things are obliged to intrust them to the keeping of other persons; either because they themselves happen to be in such circumstances that they cannot themselves keep the things, or be-

<sup>a</sup> L. 1, D. de senat. Maced.

<sup>f</sup> L. 9, § 4, eod.

<sup>g</sup> The prohibitions being only against lending money to sons who live under the paternal jurisdiction, they cease with respect to him that is emancipated; for he is become master of himself, and has the management of his own affairs. See the fifth and sixth articles of the second section of the title of *Persons*.

<sup>h</sup> L. 3, D. de senat. Maced.; — v. l. 3, D. de off. prat.

<sup>i</sup> L. 12, D. de senat. Maced.; — l. 7, § 15, eod.; — l. 9, § 4, eod.

cause the things would not be safe in their custody, or for other causes. And in all these cases care is taken of the things, by putting them into the hands of persons whom the owners believe to be honest, and who are willing to take charge of them. It is this covenant which is called a *deposit*.

680. *The Consequence of the Fidelity of the Depositary.* — Seeing a deposit is made mostly in private, and without writing, and it being a contract of frequent and necessary use, and the safety of the thing deposited depending on the honesty of the person who takes charge of it;<sup>a</sup> so there is no engagement which more particularly demands fidelity, than that of the depositary.

681. *Sequestration.* — The first kind of deposit is transacted only between two persons, the one who deposits the thing, and the other who takes charge of it. But there is another sort of deposit, when, two or more persons being in dispute about the rights of property or possession, which every one of them pretends to have in one and the same thing, they deposit it into the hands of a third person, who is called *sequestrator*, that he may keep it till the controversy is decided, and then restore it to the person who shall be declared to be the right owner. And the use of this sequestration is to prevent the mischiefs that would happen in case any of the parties should attempt by force to take possession of the thing, and exclude the others. Thus, the effect of this sequestration is to preserve to every one of the persons that agree to it the right which they have to the thing sequestrated, by preserving the thing itself; and to deprive them all of the use of this right, in so far as concerns the possession and enjoyment, laying up safely the fruits or other revenues, if the thing produces any, that they may be restored, together with the thing itself, to the person who shall be found to be the true owner.

682. The sequestrator may be named either by the common consent of the parties, when they all agree to it; or by the judge, when the uncertainty of the true owner of a thing controverted, and the necessity of committing it to the care and keeping of somebody, oblige the judge to order the thing to be sequestered pending the suit. And this is a judicial sequestration, which is different from one made by consent of parties, that being a covenant, and the other a regulation made by the judge.

683. The judicial sequestration does not come within the design

<sup>a</sup> Totum fidei ejus commissum. L. 1, D. depos.



of this work, it being a part of the order that is observed in judicial proceedings; but because the natural rules of sequestration by consent of parties have for the most part their use in judicial sequestrations, we may apply to them the rules of this title which have any relation thereto.

684. *Deposit of Things immovable.*—Although the use of a deposit might seem to be confined to things that are movable, because of the origin of the word, which implies that the thing deposited is to be moved from one place to another, and though sequestration is chiefly used in things immovable; yet nevertheless things that are movable may be sequestered, when the possession is controverted, and things immovable may be committed to one's keeping, by way of deposit, when there is occasion for it; as those persons do, who during their absence give their house, with all that is in it, in keeping to a friend, with whom they leave the keys; and the house itself is, as it were, deposited into the hands of the person to whose care it is committed, whether he dwell in it or not.

685. *Wagers.*—There is another sort of deposit in wagers, when the wagerers deposit the bet in the hands of a third person. Thus people lay wagers, where the bet is to be given to the most skilful in some lawful exercise, such as fencing, wrestling, running, and others; and this was the only kind of game where it was lawful by the Roman law to play for money; and even at this, the Romans were allowed to play but for a very small matter; the wealthiest were not to exceed a shilling a time.<sup>b</sup>

686. Seeing this deposit of wagers has no other rules besides those of other deposits, and the agreement of the wagerers, we shall not insert in this title any thing concerning wagers in particular.

687. *A Necessary Deposit.*—There is yet another kind of deposit, which is called *necessary*; because it is necessity that forces people upon it. Thus, in a fire, earthquake, shipwreck, or other case of the like nature, people give to their neighbours, or to other persons whom they accidentally meet with, the things which they save from such kinds of losses. And although this deposit is often made without agreement, at least without any express agreement, as when people throw goods out of houses that are on fire into the houses of their neighbours, natural equity strictly obliges those to whose keeping things are committed on such occasions to take

<sup>b</sup> L. 2, § 1, et l. 3, D. de aleat.;—v. tot. tit. C. eod.;—l. 1, in f. C. eod.

care of them. And the Roman laws punished such as did not restore things that were deposited on such doleful occasions, by obliging them to pay double the value.<sup>c</sup>

688. Since this deposit, although necessary, is always a kind of agreement, either express or tacit, and obliges in the same manner, and by the same rules, as other deposits, it shall likewise be inserted in this title.

689. *Deposit of Things distrained.*—We do not set down among the matters treated of under this title, the deposit of things that are distrained from debtors, and which the magistrate commits to the keeping of certain persons. For besides that this deposit is not a covenant, it is a part of the order of judicial proceedings, and does not belong to the design of this work, although many of the rules explained in this title may be applied to it.

690. *Things deposited with Innkeepers.*—There is likewise another sort of deposit, of clothes and goods which travellers put into the hands of innkeepers, masters of ships, and carriers. But seeing this deposit is only a consequence of the engagements of those kinds of persons, who are accountable, not only for their own proper deed, but also for that of their servants and agents, this matter will come in more properly under the sixteenth title of this book, where the engagements of such persons shall be considered.

## SECTION I.

### OF THE NATURE OF A DEPOSIT.

#### ART. I.

691. *Definition of a Deposit.*—A deposit is a covenant, by which one person gives to another something to keep;<sup>a</sup> which he is to restore whenever the depositor shall think fit to call for it.<sup>b</sup>

#### II.

692. *The Deposit ought to be gratuitous.*—The deposit ought to be gratuitous; for otherwise it would be a hiring and letting to hire, where the depositary would let out his care.<sup>c</sup>

<sup>c</sup> L. 1, §§ 1 et 4, D. depos.; — § 17, Inst. de action.

<sup>b</sup> L. 1, § 22, eod.

<sup>a</sup> L. 1, D. dep.

<sup>c</sup> L. 1, § 8, D. dep.

## III.

693. *Immovables may be deposited.*—Although a deposit be properly only of movables, yet immovables may be deposited, as a house, or any other tenement, with the fruits arising from it.<sup>d</sup>

## IV.

694. *People may deposit the Goods of others; and a Thief may deposit what he has stolen.*—People may deposit, not only what is their own, but likewise what belongs to others; whether they came by the possession of the thing honestly, as an agent, or factor; or whether they came by it dishonestly. Thus even thieves and robbers may deposit what they have taken by theft or robbery. For it is reasonable that the thing should be preserved, in order to be restored to the true owner.<sup>e</sup>

## V.

695. *Restitution of the Thing to its Owner.*—When one deposits the goods of another man, the depositary is not obliged to restore them to the person who deposited them, if the right owner appears and claims his goods. Thus, if it is a thief that has deposited what he stole, the fidelity required in a deposit does not oblige the depositary any longer to the thief; but the knowledge of the theft obliges him to restore the thing to its owner.<sup>f</sup> But if there is any doubt as to the right of the person who calls himself owner, or if his right is disputed by the person who has deposited the thing; the depositary becomes in that case a judicial depositary, and, as it were, a sequestrator. And he is to wait for the decision of the controversy, that he may restore the thing to the person who shall be declared the true owner of it.

## VI.

696. *In what Case the Thing deposited may be restored to another than the Owner.*—If one deposits a thing belonging to another, or a servant that which is his master's, the depositary may restore it to the person who deposited it, if he has no just cause to think he does ill in restoring it to him. Which he would certainly have, if he knew that his servant, for example, were not any longer in the service of that person, or that he ought to mistrust his

<sup>d</sup> L. 38, § 10, D. *de usur.*;—L. 1, § 24, D. *dep.*

<sup>e</sup> L. 1, § 39, D. *dep.*

<sup>f</sup> L. 31, § 1, D. *dep.*

honesty. And it is by the circumstances that we are to judge whether the depositary ought to have restored it to another than the owner.<sup>a</sup>

## VII.

697. *The Thing deposited may be taken back when the Master pleases.* — Since it is the nature of a deposit, that the things are not deposited for the behoof of the depositary, as things are lent for the use of the borrower, but for the bare advantage of the depositor, he may take back the thing deposited whenever he pleases; even although the time of restitution were regulated by the contract. For it depends on the owner to take back the thing deposited whenever he pleases, provided he do not do it at an unseasonable time, when the depositary cannot restore it, because of some impediment which he is not to blame for.<sup>b</sup>

## VIII.

698. *Of the Place where the Thing deposited ought to be restored.* — The deposit obliging the depositary only to the bare custody of the thing, it is the nature of this contract that the thing deposited be restored in the place where it is kept; and the depositary is not obliged to transport it in order to deliver it, unless he has knavishly removed it out of the place where he ought to have kept it.<sup>1</sup>

## IX.

699. *The Produce of the Thing deposited is likewise comprehended in the Deposit.* — The deposit extends not only to the thing that has been deposited, but if the thing produces any fruits, or other profits, whatever is the produce of it will likewise be comprehended in the deposit, and the depositary will be charged with the produce, as well as with the thing itself that was deposited. Thus, he who has undertaken the charge of a flock of sheep must restore the wool and the lambs which they produce.<sup>1</sup>

## X.

700. *Leave given to the Depositary to make Use of the Thing deposited.* — If one deposits money, or any other thing, giving leave

<sup>a</sup> L. 11, D. depos.

<sup>1</sup> L. 12, § 1, D. depos.

<sup>b</sup> L. 1, §§ 45, 46, D. dep.; — l. 1, § 22, D. cod.

<sup>1</sup> L. 1, §§ 23 et 24, D. depos.; — l. 38, § 10, D. de usur.

to the depositary to use it, and he makes no manner of use of it, he shall be liable only to the engagements of a depositary, and pursuant to the rules which shall be explained in the third section. But if he uses the thing deposited, his engagements changing its nature, he shall be bound, either according to the rules of the loan of things to be restored in specie, if it is a thing that is not destroyed by its use, or according to the rules of the loan of things to be restored in kind, if the thing is of such a nature that it ceases to be in the borrower's possession as soon as he makes use of it.<sup>a</sup>

## XI.

701. *If the Thing deposited belongs to several Persons.* — If the thing deposited belongs to several persons, whether it be that it had several owners at the time that it was deposited, or that it has passed to several coheirs of the person who deposited it, the depositary ought not to restore it but to all of them together, if it is a thing that cannot be divided; or he ought to give to every one his share, if the thing is divisible, such as a sum of money, and all the partners are agreed as to their portions. And if the thing deposited was sealed up, it shall not be opened, but in presence of all the owners, that it may be delivered to them all together. But if any of them were absent, or if there was a dispute among those that were present, the depositary ought not to restore the thing deposited, till security is given him that he shall not be molested by any of the parties; or till he be judicially discharged of his trust, by consigning the thing in court, according to the usual form, that the judge may see to the opening and dividing of the thing deposited, and take care of the shares belonging to the partners that are absent.<sup>a</sup>

## XII.

702. *If, after one of the Coheirs has received his Portion of the Thing deposited, the Depositary becomes insolvent.* — If in the case of a thing deposited belonging to several coheirs, after that one of them has received his share, the depositary becomes insolvent, or loses the thing without any fraud of his, this coheir will not be bound to divide his share with his coheirs.<sup>o</sup> For although what he has received did belong in common to them all, while it was in

<sup>a</sup> L. 1, § 34, D. dep.

<sup>a</sup> L. 1, § 36, D. dep.; — l. 14, cod.

<sup>o</sup> L. ult. C. depos.

the hands of the depositary, yet since that heir received only his own portion by his diligence, before the insolvency of the depositary, or loss of the thing, the others ought to bear the loss of that event, either as an effect of their own negligence, or as an accident happening to them.

## XIII.

703. *If, the Thing deposited belonging to many Owners, it be agreed that any one of them may call for it.*—If many persons deposit the same thing, and it be agreed that one of them, or every one of them alone, may take back the whole thing that is deposited, the depositary will be discharged of his trust, by restoring the thing to the person who had right singly to call for it. And if it is not regulated to whom the thing deposited shall be delivered, it shall be restored according to the rule explained in the eleventh article.<sup>p</sup>

## XIV.

704. *A Thing deposited with several Persons.*—If two or more persons are become depositaries of one and the same thing, each of them shall be bound for the restitution of the whole. For the thing deposited is not restored, unless it be restored entire; and they shall be answerable for one another in case of any fraud committed by any one of them; neither will the action that is brought against one of the depositaries take away the right of suing afterwards all the others, until the whole thing is restored.<sup>q</sup>

## XV.

705. *If the Depositary uses the Thing deposited.*—The depositary who uses the thing deposited, against the owner's will, commits a sort of theft; and he will be liable for all the damages which the owner suffers thereby.<sup>r</sup>

## XVI.

706. *A Thing deposited for the Behoof of the Depositary.*—If the thing is deposited for the behoof of the depositary, as if any goods are left with him to be sold, that he may keep the price as money lent; or if a sum of money is given him on condition that,

<sup>p</sup> L. 1, § 44 D. depos.

<sup>q</sup> L. 1, § 43, D. depos.; — v. l. 15, D. de tutelæ et rat. dist.; — l. 22, D. depos.

<sup>r</sup> § 6, Inst. de obl. quæ ex del. nasci.; — l. 3, C. depos.

if he meets with a purchase, he shall make use of the money; and it happens that what was given him on that condition perishes before it was used, this depositary shall be bound to make it good, even although it perished by an accident.<sup>a</sup> For he was not a depositary under obligation to restore the thing to the owner, but to sell it, and to lay out the money on his own affairs, which changes the nature and effect of the deposit.

## XVII.

707. *A Coffer deposited, in which are many Things.*— One may deposit things which are not shown to the depositary; as if one gives him in keeping a coffer sealed up, or under lock and key, without letting him know what is in it, whether it be money, papers, or other things. And in this case, he is bound only to restore the coffer in the same condition, without being accountable for the things which the depositor may pretend to have put in it. But if the depositor has shown to the depositary all the particular things that were in the coffer, the latter ought to answer for every one of the things which he took charge of.<sup>b</sup>

## SECTION II.

### OF THE ENGAGEMENTS OF THE DEPOSITOR.

#### ART. I.

708. *Expenses of keeping the Thing deposited.*— If the depositary finds himself obliged, either because of the quality of the thing deposited, or because of some event, to be at any charge in keeping it, he shall recover what he has laid out. As if, for example, he was obliged to hire a stable for keeping a horse, that was left with him in trust.<sup>a</sup>

#### II.

709. *The Charges of preserving it.*— The depositary will likewise recover whatever he has laid out on the preservation of the thing deposited, as if he has made any repairs in it: or if, having

<sup>a</sup> L. 4, D. de reb. cred.

<sup>b</sup> L. 1, § 41, D. depos.

<sup>a</sup> This is a consequence of the nature of a deposit, which, being made only for the behoof of the depositor, ought to be no ways chargeable to the depositary. See the following article.

in his custody some cattle, he has been at the charges of their nourishment.<sup>b</sup>

### III.

710. *The Charge of Transportation.*—If, to restore the thing deposited, carriages are necessary for transporting it, the depositary is not bound to be at the charges, and the owner is obliged to go and fetch it, and to be at the charges of transporting it, if any are necessary, or to reimburse the depositary, if he has advanced the money.<sup>c</sup>

### IV.

711. *Discharge of the Depositary.*—If the depositary is not willing to keep the thing deposited any longer, and offers to restore it, either after the time fixed by the contract, if any such regulation was made, or even before, the depositor shall be bound to take back the thing, provided it be not at an unseasonable time, when, the depositary being able to keep the thing without any loss, the owner cannot conveniently take it back. For in this case, it would be necessary to regulate a time for discharging the depositary of his trust.<sup>d</sup>

## SECTION III.

OF THE ENGAGEMENTS OF THE DEPOSITARY, AND HIS HEIRS, EXECUTORS, OR ADMINISTRATORS.

### ART. I.

712. *The Foundation of the Care of the Depositary.*—The depositary being obliged to keep the thing intrusted with him, he is by consequence bound to take some care of it.<sup>a</sup> But because he does this service for nothing, and only to do a kindness, his condition is distinguished from that of other persons, who for their

<sup>b</sup> L. 23, *D. depos.*; — l. 8, in *f. D. eod.* See the seventh article of the third section of *Letting and Hiring*, and the fourth article of the third section of the *Loan of Things to be restored in Specie*.

<sup>c</sup> L. 12, *D. depos.*

<sup>d</sup> By the same reason that the depositor is permitted to take back the thing deposited before the time, and whenever he pleases. See the seventh article of the first section of this title. V. l. 1, § 36, *D. depos. in verbis*, Si hoc voluerit: si hoc recusaverit.

<sup>a</sup> L. 1, *D. depos.*



own advantage have in their possession things belonging to others; such as he who borrows, and he who hires; and the depositary is bound only according to the rules which follow.

## II.

713. *Care of the Depositary.* — The depositary is bound to take the same care of the things deposited that he does of his own. And he would be unfaithful to his trust, if he were less careful of them than of what belongs to himself.<sup>b</sup>

## III.

714. *Fraud or Negligence near akin to it.* — If the depositary suffers the thing deposited to be lost, to perish, or be spoiled, through any fraud or knavery, or through any fault or negligence of his that cannot be excused, he shall be bound to make it good; <sup>c</sup> and the fault will be of this nature, if it is such as the depositary would not have readily fallen into, according to his usual management of his own concerns.<sup>d</sup>

## IV.

715. *The same.* — It is also an excusable fault, and which the depositary ought to account for, if he fails to use such precautions as no other person would omit, such as keeping money under lock and key.<sup>e</sup>

## V.

716. *A Depositary negligent of his own Affairs.* — If the depositary is a person of a weak judgment, or a minor without experience, or one that is negligent in his own affairs, such as a prodigal; he who has deposited any thing in the hands of such a depositary cannot require of him the same care that a diligent and careful person would take of it. And if the thing deposited perishes through any fault which the said person was not able to avoid, the depositor ought to blame himself for having chosen such a depositary.<sup>f</sup>

<sup>b</sup> L. 32, D. depos.

<sup>c</sup> L. 1, C. depos.; — l. 32, D. eod.

<sup>d</sup> D. l.

<sup>e</sup> L. 223, D. de verb. signif. By the law of God, the depositary is answerable for theft, because it does not happen but for want of care. "And if it be stolen from him, he shall make restitution unto the owner thereof." Exod. xxii. 10, 12. See the third article of the eighth section of *Letting and Hiring*, and the second article of the second section of the *Loan of Things to be restored in Specie*.

<sup>f</sup> L. 32, D. depos.; — § 3, Inst. quib. mod. re contr. obl. We must understand the expres-

## VI.

717. *If the Thing is lost without the Depositary's Fault.*— If the thing deposited happens to be lost, or perishes, whether through its own nature, as, if a horse, although he be kept, makes his escape, and is lost; or by an accident, which cannot be imputed to the depositary, he shall be discharged, by restoring whatever remains of the thing deposited.<sup>a</sup>

## VII.

718. *Agreement touching the Quality of the Care to be taken by the Depositary.*— If, because of some particular consideration, it has been regulated what the depositary shall be bound to, his engagement shall be to him in place of a law. And he shall be bound to answer, either for what shall happen for want of the care which he promised to take, or for the events which he has charged himself withal. For the thing would not have been intrusted with him, but upon this condition.<sup>b</sup>

## VIII.

719. *A Depositary that obtrudes himself.*— If the depositary, not being desired, offers of his own accord to take care of the thing deposited, he shall be accountable, not only for what he does fraudulently, and for gross mistakes, but likewise for other faults. For the depositor might have chosen another depositary that would have been more careful. But this depositary shall not be answerable for what may happen without his fault, through some accident.<sup>c</sup>

## IX.

720. *Of the Depositary who has sold the Thing deposited and bought it again.*— If the depositary, having sold or otherwise alienated the thing deposited, recovers it again, and keeps it as a deposit, he shall be accountable thereafter, not only for what he does fraudulently, and for gross errors, but also for the least faults

sions of this text in a sense which agrees with the preceding rules. For we ought not to discharge indifferently all depositaries of the losses which may happen through their slothfulness and negligence.

<sup>a</sup> L. 1, C. depos.; — v. l. 12, § 3, l. 14, § 1, D. eod.; — l. 23, in f. D. de reg. jur.; — v. l. 5, § 2, D. de cond. caus. dat. caus. n. sec.; — v. l. 20, D. depos.; — Exod. xxii. 13.

<sup>b</sup> L. 1, § 6, D. depos.; — d. l. § 35; — l. 23, D. de reg. jur.; — l. 1, C. depos.; — l. 7, § 15, D. de pact.

<sup>c</sup> L. 1, § 35, D. depos.

commits, as a punishment of his former knavery in selling the thing.<sup>1</sup>

## X.

721. *If the Depositary delays to restore the Thing.*—If the thing deposited being demanded, the depositary who is able to restore it delays to do it, his delay will make him answerable, not only for the least faults he commits, but likewise for the accidents that may fall out after the time of the legal demand.<sup>m</sup> But if the thing perishes through its own nature, without any accident, and if it would have perished although the depositary had restored it in time, this loss not being an effect of his delay, he is not accountable for it.<sup>n</sup>

## XI.

722. *When the Thing may be restored in any one of many Places.*—If it is agreed that the thing deposited shall be restored in any one of many places, the depositary shall have the choice of the place.<sup>o</sup>

## XII.

723. *Executor or Administrator of the Depositary.*—The executor or administrator of the depositary is accountable for the act of the deceased, even for the fraud which he has been guilty of.<sup>p</sup>

## XIII.

724. *If the Executor or Administrator of the Depositary sells the Thing deposited.*—If, after the death of the depositary, his ex-

<sup>1</sup> L. 1, § 25, *D. depos.*

<sup>m</sup> L. 12, § 3, *D. depos.* See the third article of the seventh section of the *Contract of Sale*, and the second article of the fourth section of the title of *Damages occasioned by Faults*.

<sup>n</sup> L. 14, § 1, *D. depos.* See the same third article of the seventh section of the *Contract of Sale*.

Although the thing perishes through its own nature, yet we must judge by the circumstances whether the delay of the depositary ought to go unpunished. For if the thing deposited was in good case at the time of the demand, and the proprietor could have sold it, as if it was a horse deposited by a jockey, the delay being without any just cause, it would be either knavery or a fault in the depositary that was able to restore it, which would make him answerable for the loss. L. 15, § ult. *D. de rei vind.*

<sup>o</sup> L. 5, § 1, *D. depos.*

<sup>p</sup> L. 7, § 1, *D. depos.*

executor or administrator, being ignorant of the trust, sells the thing deposited, believing it to be a part of the succession; as if it happen that the memorandum which the depositary had made to distinguish the thing deposited from his own, being sealed up with other papers, it is necessary in the mean while to sell some of the movables, and the thing deposited chances to be among them, having no mark to distinguish it from the goods of the deceased; as if it was a horse, which, standing in the stable with other horses, had been sold, the person who deposited him having perhaps neglected to take him away; this event would be, as it were, an accident that would discharge this executor or administrator from making restitution of the thing deposited, he paying always the price which he got for the thing when he sold it.<sup>1</sup> The proprietor would nevertheless retain his right of claiming the thing, in whose hands soever he should find it.

## XIV.

725. *A Thing deposited does not enter into Compensation.*—The depositary cannot detain the thing deposited with him, in compensation of what the depositor owes him, even although it were another deposit; but each depositary shall be obliged to restore the thing deposited with him.<sup>2</sup>

<sup>1</sup> *L. 1, § ult. et l. 2, D. depos.* We have set down in this article the particular circumstances which may justify the conduct of this executor or administrator. For there may be other circumstances, where the executor or administrator would not be easily discharged on his pretending ignorance of the trust; since he is accountable for the act of the deceased, as has been said in the foregoing article; and the deceased was obliged to distinguish the thing deposited from his own by some mark, or some memorandum. Thus, it seems to be by the circumstances of the quality of the persons and of the thing deposited, of the conduct of the depositary and his executor or administrator, and other circumstances of the like nature, that we ought to judge of the obligation of the depositary's executor or administrator.

It is to be remarked on the law cited on this article, that, although it discharges the executor or administrator of him who had borrowed a thing, if the said executor or administrator had sold it, in the same manner as it discharges the executor and administrator of the depositary, yet we have not set down this rule in the title of the *Loan of Things to be restored in Specie*. For whereas the deposit is only for the behoof of the depositor, the loan of a thing for use is barely for the advantage of the borrower. And for this reason it seems to be just that this loss should fall upon the executor or administrator of the borrower, rather than on the lender. See *Exod. xxij. 14.*

<sup>2</sup> *L. 11, C. depos. ; — l. ult. C. de compens. in f.*

## SECTION IV.

## OF SEQUESTRATION BY CONSENT OF PARTIES.

## ART. I.

726. *Definition of a Sequestrator by Consent of Parties.* — The sequestrator by consent of parties is a third person, chosen by two or more persons to keep as a deposit a movable or immovable thing, the property or possession of which is controverted among them, and to restore it to the person who shall be acknowledged to be the true owner. Thus every one of them is considered as if he alone had deposited the whole thing. Which distinguishes such depositors from those who, depositing a thing that belongs to them in common, have only each of them their share in it.<sup>a</sup>

## II.

727. *Every one of those who have named the Sequestrator may oblige him to the Discharge of his Trust.* — While a thing is under sequestration, each of the persons who have deposited it is considered as capable of being declared the owner of it. And this gives them all, and every one of them in particular, a right to see that the sequestrator carefully performs the trust which he is bound to by his office, whether it be in preserving the thing, or if it is houses or lands that are deposited, in repairing and cultivating them.<sup>b</sup>

## III.

728. *Difference between a Depositary and a Sequestrator.* — Seeing the person into whose hands a piece of ground is sequestered is bound to cultivate it, and to take care of it, this kind of deposit is not usually gratuitous. But the sequestrator is allowed a salary, besides his expenses, for the time and pains he bestows on the execution of his commission. And this distinguishes sequestration from a bare deposit, which ought to be gratuitous, and obliges the sequestrator to the same care that he is bound to who undertakes a piece of work to be done.<sup>c</sup>

<sup>a</sup> L. 17, D. depos. ; — l. 6, D. eod.

<sup>b</sup> L. 17, D. depos. ; — l. 5, § 1, eod.

<sup>c</sup> L. 1, § 9, D. depos. See the eighth section of the title of *Letting and Hiring*.

## IV.

729. *The Sequestrator's Possession, and its Effect.*— While a thing is deposited, the owner retains the possession, and his depositary possesses for him. And in sequestration, the possession of the right owner remains in suspense; for it cannot be said of any one of the pretenders to the thing sequestered, that he possesses the thing, since, on the contrary, they are all of them divested of the possession. But because the sequestrator possesses the thing only in order to preserve it to the person who shall be declared the true owner, this possession, after the controversy is ended, will be considered, with respect to the owner, as if he himself had always possessed it. And this possession will be allowed a good possession to establish a title by prescription.<sup>d</sup>

## V.

730. *The Sequestrator must account.*— After the controversy is ended, the sequestrator is obliged to account to the person who is adjudged to be master, and to restore to him the thing sequestered, with the fruits, if it produces any, he being paid his salary, and his expenses.\*

## VI.

731. *Discharge of the Sequestrator.*— If the sequestrator is desirous to be discharged of his trust, and the persons who named him, or any one of them, does not consent to it, he ought to apply himself to the judge, and to get them all to be cited in order to name another person in his room. For he having accepted a commission which has divers consequences, and which ought to have lasted till the controversy was ended, he ought not to be discharged without just cause.<sup>f</sup>

## VII.

732. *Rules of Deposit which may be applied to Sequestration.*— We may apply to sequestration the rules of a deposit which have any relation thereto.<sup>g</sup>

<sup>d</sup> L. 17, § 1, D. depos.; — l. 39, D. de acq. vel am. possess.

\* This is an essential condition of this kind of deposit, which is granted only in order to preserve the thing to the person who shall be declared the right owner. L. 5, § 1, D. depos.

<sup>f</sup> L. 5, § 2, D. depos.

<sup>g</sup> L. 5, § 1, D. depos.

## SECTION V.

## OF A NECESSARY DEPOSIT.

## ART. I.

733. *Definition of a Necessary Deposit.*—A necessary deposit is that of things which are saved in a fire, an earthquake, or shipwreck, in an incursion of robbers, a tumult, or any other sudden and accidental occasion, which obliges the owners to put what they can save into the hands of the first persons they meet with, whether it be neighbours or others.<sup>a</sup>

## II.

734. *This Deposit is by Agreement.*—This deposit, although necessary, is nevertheless voluntary, and by agreement, because the delivery of the things to the persons with whom they are deposited is in place of a covenant, express or tacit.<sup>b</sup>

## III.

735. *The Duty of a Depositary in a Necessary Deposit.*—He with whom a thing is deposited through necessity is bound to be as faithful to his trust as, or rather more than, any other depositary, not only because of the compassion which the occasion of this deposit demands, but because of the necessity which puts the thing into his hands, the owner not being at liberty to choose another depositary.<sup>c</sup> And if he fails to restore the thing deposited, or misbehaves in his trust, it is for the public good that this infidelity should be revenged, and restrained by some punishment, such as the judge shall think fit to inflict, according to the circumstances.<sup>d</sup>

## IV.

736. *The Rules of other Deposits may be applied to this.*—We may apply to this kind of deposit the other rules which have been explained under this title, according as they have relation thereto.<sup>e</sup>

<sup>a</sup> L. 1, § 2, *D. depos.*; — v. d. l. 1, § 1.

<sup>b</sup> § 3, *Inst. quib. mod. re contr. obl.*

<sup>c</sup> L. 1, § 1, *D. depos.*; — l. 1, § 4, *D. eod.*

<sup>d</sup> Seeing we do not use this penalty of the double, and that penalties are arbitrary in France, we have thought proper to set down here this rule in the manner that it is in the article.

<sup>e</sup> It will be easy to discern among the rules of this title those that are applicable to a necessary deposit.

## TITLE VIII.

## OF PARTNERSHIP.

737. *The Origin of this Contract, and its Use.*—All mankind together makes one universal society, in which those who happen to be linked together by their wants form among themselves different engagements, proportioned to the causes which render them necessary one to another. And among the different ways in which the wants of men tie them together, this of *Partnership*, which shall be the subject of this title, is of necessary and frequent use; so that we see many partnerships, and those of many sorts.

738. The origin of this kind of union proceeds from the nature of certain works, of certain commerces, and other affairs, which are of so large an extent, that they demand the union and application of many persons. It is this which engages men to erect companies for carrying on manufactures, for trading into foreign countries, for farming the king's revenues, or those of particular persons, and for managing other affairs of several kinds, according as they demand the united labor, industry, care, credit, purse, and other assistance of many persons. And the use of these kinds of partnership is to facilitate the undertaking, the work, the trade, or other affair for which the partnership is contracted; and to secure to every one of the partners out of the share which he has contributed, in conjunction with his copartners, such profits and advantages as none of them could be able to make by themselves.

739. The first sort of partnership is limited to certain kinds of affairs, or commerces; but there are others, where the partners enter into a community of all that they are able to make by their industry and labor. There are likewise some partnerships, where the partners agree to a reciprocal communication of all that they may acquire, by donation, succession, or in other ways. And there are some where the partners agree to a community of all goods whatsoever, without exception.

740. These are the several sorts of partnerships, which differ from one another according to the interest and intention of the persons who join in them, that we shall treat of under this title.

741. We ought not to set down in the number of partnerships the unions of persons that have any thing or any affair in common, independently of their will, such as coheirs, the legatees of



one and the same thing, and those who, through other causes, chance to have something between them that is not divided, or some affair belonging to them in common, without any agreement. For these ways of having a thing in common are quite of another nature than partnership, which is formed by consent, and they shall have a place among the matters to be treated of in the second book.

## SECTION I.

### OF THE NATURE OF PARTNERSHIP.

#### ART. I.

742. *Definition of Partnership.* — Partnership is a covenant between two or more persons, by which they join in common, either their whole substance, or a part of it; or unite in carrying on some commerce, some work, or some other business, that they may share among them all the profit or loss which they may have by the joint stock which they have put into partnership.\*

#### II.

743. *The Shares of Partners in the Common Thing.* — The things or affairs that are in common among partners belong to every one of them, for the shares that are allotted to them by their covenant.<sup>b</sup>

#### III.

744. *Shares in the Gain or Loss.* — The consequences of the partnership, such as the contributions, the gain, the loss, regard every one of the partners, in proportion to the share they have in the stock, or according as they have agreed among themselves.<sup>c</sup>

#### IV.

745. *These Shares are equal, if nothing is said to the contrary.* — If the portions of loss and gain have not been adjusted by the covenant, they will be equal: for if the partners have made no distinction which gives more to one and less to another, their condi-

\* L. 5, D. *pro socio*; — l. 1, in f. D. *cod.*; — l. 52, § 1, in f. *cod.*; — l. 67, *cod.*; — l. 52, § 4, in f. *cod.*

<sup>b</sup> L. 29, D. *pro soc.*

<sup>c</sup> L. 52, § 4, D. *pro soc.*; — l. 29, *cod.*

tions not being distinguished, the condition of every individual partner ought to be the same with that of the others.<sup>d</sup>

## V.

746. *The Share of the Profit regulates that of the Loss.* — Although the partners have not expressly designated both the portions of the gain and those of the loss, yet if the portions of the gain have been expressed, those of the loss will likewise be regulated on the same foot. And if, without saying any thing of the gain or loss, it be sufficiently expressed what every one has put into the common stock, the portions of the gain and loss will be the same with those of the stock.<sup>e</sup>

## VI.

747. *Difference of Contributions, and of Portions.* — Seeing the partners may contribute differently, some more and others less, of labor, industry, credit, favor, money, or other thing, it is free for them to regulate in an unequal manner their portions, or shares, according as every one ought to have his condition more or less advantageous, in proportion to the difference of what they contribute.<sup>f</sup>

## VII.

748. *Equality of Shares, notwithstanding the Difference of Contributions.* — It is not necessary for the equality of shares of the partners in the profit arising from the partnership, that all their contributions should be equal, that every one should furnish as much money, as much industry, as much credit, as every one of the other partners: but according as they contribute differently, one more money, another more industry, a third more credit, their condition may be equal, by the equality of the advantages arising from these different contributions. And very often it is agreed, and with reason, that one of the partners shall contribute only his industry, and the other all the stock, and that nevertheless the profit shall be equal, because the industry of the one is worth the money of the other.<sup>g</sup>

<sup>d</sup> L. 29, D. pro soc.; — § 1, Inst. eod.

<sup>e</sup> § 3, Inst. de societ.

<sup>f</sup> L. 29, D. pro soc.; — § 1, Inst. de societ.; — l. 80, D. pro soc.

<sup>g</sup> § 2, Inst. de societ.; — l. 1, C. eod.; — l. 5, § 1, D. pro soc.

## VIII.

749. *Inequality of the Share of the Gain, and of the Share of the Loss.* — This is another effect of the inequality of the contributions, that two partners may agree that the one shall have a greater share of the profit than he shall bear of the loss; and that the other, on the contrary, shall bear a greater part of the loss than he shall have in the profit. And thus, for example, the partners may agree, that one shall have two thirds of the profit, and bear one third of the loss, and that the other shall have one third of the profit, and bear two thirds of the loss; which is to be understood in this manner, that in case in several affairs of the partnership there be gain on one side and loss on another, that is only reckoned to be gain which shall remain clear after all the losses are deducted.<sup>a</sup>

## IX.

750. *One of the Partners discharged of all Loss.* — The same consideration of the different contributions of the partners may likewise justify the covenant by which it is stipulated, that one of the partners shall have a share of the gain, and be altogether free from loss; because, for example, of the usefulness of his credit, his favor, his interest, or of the pains which he takes, the journeys which he makes, and the dangers to which he exposes himself. For these advantages which the company reaps from him compensate that which the partners grant him, by freeing him of the losses. And he might very lawfully have refused to engage himself except on this condition, without which he would not have entered into the partnership, which perhaps could not have been settled and managed without him. But the share which this partner shall have in the profits is to be understood, only of the clear gain that remains, after deduction of all the losses out of the profits of the several affairs of the company, as has been said in the foregoing article.

## X.

751. *Fraudulent Partnership.* — All partnerships in which there is any condition that is contrary to equity and honesty are unlawful. As if it should be agreed, that the whole loss should fall

<sup>a</sup> § 2, *Inst. de societ.*; — l. 30, *D. pro soc.*

<sup>i</sup> § 2, *Inst. de societ.*; — l. 29, § 1, *D. pro soc.*

upon one of the partners, without his having any share of the profit, and that the whole profit should go to the other partner, without his bearing any share of the loss.<sup>m</sup>

## XI.

752. *Unlawful Partnership.*— We cannot enter into partnership, except it be of a commerce, or other thing, that is honest and lawful. And all partnerships contrary to this rule would be criminal.<sup>n</sup>

## XII.

753. *Difference between Partnership, and other Contracts, as to the Extent of the Engagements.*— The contract of partnership is in this different from other contracts, that every one of the other contracts hath its engagements limited and regulated by its particular nature; whereas partnership has a general extent to the engagements of the different affairs, and of the several covenants into which the partners enter. Thus, their engagements are general and indefinite, such as those of a tutor, or of one who undertakes the care of another's concerns in his absence, and without his knowledge.<sup>o</sup> And likewise honesty and fair dealing have in this contract an extent proportioned to that of the engagements.<sup>p</sup>

## SECTION II.

## IN WHAT MANNER PARTNERSHIP IS CONTRACTED.

## ART. I.

754. *Partners ought to choose one another reciprocally.*— Partnership cannot be contracted but by the consent of all the partners, who ought reciprocally to choose and approve of one another,<sup>q</sup> in order to form among themselves a tie, which is a kind of brotherhood.<sup>b</sup>

<sup>m</sup> L. 3, § ult. D. pro soc.; — l. 29, § 2, D. eod.

<sup>n</sup> L. 57, D. pro soc.; — l. 35, § 2, D. de contr. empt.; — l. 53, D. pro socio.

<sup>o</sup> L. 38, D. pro soc. See the beginning of the second section of Tutors.

<sup>p</sup> L. 3, C. pro soc.

<sup>q</sup> Inst. de obl. ex. cons.

<sup>b</sup> L. 63, D. pro soc.

## II.

**755. Difference between having a Thing in common, and being in Partnership.** — It is not enough to form a partnership, that two or more persons have any thing in common among them, such as the coheirs of one and the same inheritance, legatees, donees, or purchasers of one and the same thing. For these ways of having something in common among many, not implying the reciprocal choice of the persons, do not link them together in partnership.<sup>c</sup>

## III.

**756. The Heir or Executor of a Partner is not a Partner.** — The choice of the persons is so essentially necessary to the constituting of a partnership, that even the heirs or executors of the partners themselves do not succeed to this quality of partner,<sup>d</sup> because it may happen that they are not fit for it; and likewise, that even they may not either relish the commerce that is carried on by the partnership, or not approve of the persons of the copartners. hence it is that, since the tie of partners can be no other than unitary, the partnership is broken off by the death of one of the partners, in the manner which shall be explained in the fifth and sixth sections.

## IV.

**757. It cannot be stipulated that the Heirs or Executors shall be Partners.** — If it had been agreed among the partners, that the partnership should be continued between their heirs or executors, this agreement would imply the condition that the heirs or executors should be liked by the copartners, and that they also should approve of the other partners. And it would not have this effect, that persons who could not sort one with another should be linked together against their wills.<sup>e</sup>

## V.

**758. The Partner of one of the Partners is not in Partnership with the others.** — If one of the partners takes another person into partnership with him, this third person will not be partner with

<sup>c</sup> L. 31, D. pro soc.; — l. 32, eod. See the seventh article of this section.

<sup>d</sup> L. 65, § 9, D. pro soc.; — l. 63, § 8, eod.

<sup>e</sup> L. 59, D. pro soc.; — l. 35, eod.; — l. 52, § 9, eod.

the others, but only with the partner who has associated him.<sup>f</sup> And this will make among them a second partnership, distinct from the first, and limited to the share of that partner who has associated to himself another.

## VI.

759. *Partnership may be contracted without Writing, and which Way.* — As consent may be given either in writing or without writing, and even among persons that are absent, by letter, proxy, or any other mediator, so partnership may be contracted all these ways, and also by a tacit consent, and by acts which make proof of it. As if persons carry on a joint trade, and share the profit and the loss.<sup>g</sup> And the partnership lasts as long as the partners are willing to continue in their union.<sup>h</sup>

## VII.

760. *Of those who buy a Thing together.* — If two or more persons, having a mind to buy the same thing, agree, in order not to raise the price by bidding against one another, to buy it jointly together, either by one of themselves, or by a third person; this agreement makes the thing bought to belong to them in common, but it does not join them in partnership. For they are not linked together by the choice of the persons, but only by the thing which they have in common.<sup>i</sup>

## VIII.

761. *The Partners are at Liberty to enter into all Manner of Lawful Pacts.* — People may in partnerships, as in all other contracts, make all manner of lawful pactions. Thus, they may contract a conditional partnership, whether it be that they will have their partnership to commence only after the condition has happened, or that they will have it to take its effect immediately, and to be dissolved by the existence of the condition.<sup>j</sup>

## IX.

762. *Pacts concerning the Duration of the Partnership.* — Part-

<sup>f</sup> L. 19, *D. pro soc.*; — l. 20, *cod.*; — l. 47, § 1, *D. de reg. jur.*

<sup>g</sup> L. 4, *D. pro soc.* See the eighth, tenth, and sixteenth articles of the first section of *Covenants*.

<sup>h</sup> § 4, *Inst. de societ.*; — l. 5, *C. pro soc.* See the fifth section of this title.

<sup>i</sup> L. 33, *D. pro soc.*; — l. 29, *D. comm. divid.*

<sup>j</sup> L. 1, *D. pro soc.*; — l. 6, *C. cod.*

nership may be contracted so as to begin either immediately, or after a certain time, and to last either to the time agreed on, or during the life of the partners,<sup>m</sup> and in such a manner that, if there are many copartners, the death of one of them may not interrupt the partnership among the others.<sup>n</sup>

## X.

763. *Penal Clauses.* — We may add to the contract of partnership penal clauses against him who shall contravene what has been agreed on; whether it be by doing what he ought not, or not doing what he ought to have done.<sup>o</sup> But the effect which these kinds of penalties are to have is to be regulated by the prudence of the judge, according to the circumstances.<sup>p</sup>

## XI.

764. *Pacts for regulating the Shares.* — The partners may either regulate themselves the shares which every one is to have in the partnership, or they may refer the matter to the arbitration of other persons; and if they have referred it to other persons, or even to one of themselves, it will be the same thing as if they had referred it to the arbitration of skilful and reasonable men; and what is determined herein by the persons named will not take place, if any of the partners has reason to complain of the award.<sup>q</sup>

<sup>m</sup> *L. 1, D. pro soc.*

<sup>n</sup> Without this agreement, the death of any one of the partners would dissolve the partnership with respect to the others, as shall be shown hereafter in the fourteenth article of the fifth section.

<sup>o</sup> *Ll. 41 et 42, D. pro socio; — v. l. 71, cod.*

<sup>p</sup> By our practice these kinds of penal clauses are only comminatory, being added to contracts, only that they may stand instead of a reparation of damages, which reparation ought to be no greater than the damage.

Thus it is by the circumstances of the events that we judge of the effect which the penal clauses ought to have. And as it is just to lessen the penalty if it exceeds the damage, or if any circumstances may excuse the non-performance of the articles of the covenant, so it may likewise happen that it may be just to decree a reparation of damages greater than the penalty; if it is not, for example, expressly said that the penalty shall stand in lieu of all damages, or if the agreement has been contravened through some fraud, or some fault of a different nature from those which the contractors did foresee, and had a mind to prevent. See the fifteenth article of the third section, and the nineteenth article of the fourth section of *Covenants*.

<sup>q</sup> *Ll. 76, 77, 78, 79, et 80, D. pro soc.; — l. 6, D. cod.* See the eleventh article of the third section of *Covenants*.

## XII.

765. *A Gift under Color of a Partnership.* — If a partnership were contracted only to color a deed of gift from one of the contractors to the other, so that the profits should belong wholly to one of the partners, this would not be a partnership, there being only one person who reaps the whole profit.<sup>r</sup> And if such a contract were entered into for the behoof of a person to whom the other cannot make over any thing by deed of gift, the contract would be null and unlawful, as being made to elude the law.<sup>s</sup>

## SECTION III.

## OF THE SEVERAL SORTS OF PARTNERSHIPS.

## ART. I.

766. *Partnerships are General, or Particular.* — Partnerships are either general, of all the goods of the partners; or particular, of some goods, some commerce, or of some farm, or other thing: and the goods which are put into the partnership become common to all the partners, although they are not delivered, and although they remain in the possession of the partner who was the owner of them before the partnership was contracted. For the intention of the partners to communicate the goods makes a tacit delivery of them; and each of the partners possesses for all the others the thing belonging to them in common which is in his custody.<sup>a</sup>

## II.

767. *The Partnership of Profits, or Pure and Simple.* — If, in a contract of partnership, the parties had omitted to express of what goods, what business, or what commerce the partnership was to consist; and it was barely said, that they joined in partnership, or that the partnership should be of the gain and profit which the partners should make, without naming any thing in particular; the partnership would extend only to the profits which the partners might make by the trade and business which they should carry on jointly together.<sup>b</sup>

<sup>r</sup> L. 5, § 2, *D. pro soc.*; — l. 35, § 3, *D. de mort. caus. donat.*

<sup>s</sup> L. 32, § 24, *D. de donat. int. vir. et uxor.*

<sup>a</sup> L. 5, *D. pro soc.*; — *Inst. de societ. in princ.*; — l. 1, § 1, et l. 2, *D. pro soc.*

<sup>b</sup> L. 7 et l. 8, *D. pro soc.*; — l. 45, § 1, *D. de acq. vel omit. hered.*



## III.

768. *The Partnership of Profits does not include Inheritances, Legacies, and Gifts.*—A partnership of gains and profits does not comprehend inheritances, legacies, gifts, whether they be gifts that are to have their effect before or after the death of the giver, nor that which the partners may have acquired any other way than by their industry, or from the effects which they have put into the joint stock. For these sorts of acquisitions have their causes and their motives in the persons of those to whom they happen; such as some merit, some tie of friendship or relation, or the natural right of inheriting; which are advantages that the partners did not mean to communicate to one another, unless the same be particularly expressed, because they are not the same in every one of the partners. Neither does this kind of partnership take in the debts owing to the partners, except they be such as may have arisen from the affairs or commerce of the partnership.<sup>c</sup>

## IV.

769. *A Partnership of all Manner of Estate and Goods excludes nothing.*—A general partnership of all manner of estate and goods includes every thing that may belong to the partners, or be acquired by them, by any cause whatsoever. For the general expression of *all manner of estate and goods* leaves nothing out. And successions, legacies, donations, and all other sorts of acquisitions and profits, are comprehended under it, unless they are specially reserved.<sup>d</sup>

## V.

770. *A Personal Reparation of Damages to one of the Partners is to be put into the Joint Stock.*—In a universal partnership of all manner of estate and goods, each partner ought to communicate, not only all his estate, real and personal, and all that may accrue from his industry; but likewise if it happens that in his particular he has been injured, or damaged in his person, or otherwise, he ought to put into the joint stock whatever he receives in satisfaction of the injury or damage done him. And if the copartner receives a reparation of damages on the account of another person,

<sup>c</sup> L. 13, *D. pro soc.*; — l. 71, § 1, *eod.*; — ll. 8, 9, 10, et 11, *D. eod.*; — l. 45, § 2, *D. de acqu. et omitt. hered.*; — l. 12, *D. pro socio.*

<sup>d</sup> L. 1, § 1, *D. pro soc.*; — l. 3, § 1, *eod.*; — l. 73, *D. eod.*

such as his son, or otherwise, he will also be bound to communicate it.\* For a partnership of all manner of estate and goods leaves nothing proper or peculiar to the partner.

## VI.

771. *The Personal Condemnation of a Partner.* — If, on the contrary, one of the partners is condemned on an accusation which he has drawn upon himself by his own folly, he alone shall bear the punishment which he has merited. But if he is unjustly condemned, the injustice ought to fall upon all the partners, and not on him alone. And the same distinction is to be made in the other kinds of condemnations in civil causes, according as the copartner has been well or ill grounded in his claim, or has defended himself ill or well.<sup>f</sup> Thus, in both these cases, it will depend on the equity of the partners, or prudence of their arbitrators, to discern aright between the losses which the copartner ought to bear alone, and those which ought to fall on the whole partnership.

## VII.

772. *Unlawful Profits do not come into the Joint Stock.* — The unlawful and dishonest gains which a copartner may make do not enter into the partnership; and he who makes them ought alone to be chargeable with making restitution of what he has ill got. But if the other partners share with him, in his unlawful gains, they will become his accomplices, and be liable to the same punishment which he may have deserved.<sup>g</sup>

## VIII.

773. *Partnerships are limited to the Things put into the Community.* — Partnerships are limited to the kinds of goods, commerce, or other things, which the partners are willing to join in common; and do not extend to those things which they have no mind to put into the community. Thus, for instance, if two brothers enjoy in common the inheritance of their father, and continue in a partnership of the profits and losses which accrue from thence, they may for all this possess each of them in particular whatever they may acquire any other way.<sup>h</sup>

\* L. 52, § 16, D. pro socio.

<sup>f</sup> L. 52, § ult. D. pro soc.

<sup>g</sup> L. 52, § 17, D. pro soc.; — l. 58, eod.; — l. 55, in f. eod.

<sup>h</sup> L. 52, § 6, D. pro socio.

## IX.

774. *If there is any Obscurity in the Contract of Partnership, to know what it comprehends.* — If the partnership happens to be contracted in terms which give occasion to doubt whether all the estate present and to come is comprehended in it, or only the present estate in possession, or there are other such like doubts; they are to be interpreted by the ways in which the partners themselves shall have executed their contract, and by the circumstances which may be able to show their intention, according to the foregoing rules, and the general rules of the interpretation of covenants.<sup>1</sup>

## X.

775. *Debts of the Community and of the Partners.* — The debts owing by the community, and its other charges, are to be paid out of the common stock; and the partnership being ended, each partner owes his share of them in proportion to the share he has in the joint stock. But the moneys borrowed by a partner, which have not been put into the common cash, or have not been laid out to the use of the community, are the peculiar debt of him who borrowed them.<sup>1</sup>

## XI.

776. *What the Partner may or may not take out of the Public Stock.* — In a universal partnership of the whole estate and goods, of all profits, and of all expenses, each partner can only dispose of his own share, and he ought not to take out of the common stock for his particular expenses more than what is necessary for the maintenance of himself and family. Thus, partners of their whole estate and goods, who have children, educate and maintain them out of the joint stock; but they cannot take marriage portions out of it for their daughters. For a marriage portion is a capital, which the partner ought to take out of his own share, unless it be otherwise regulated by contract or custom.<sup>2</sup>

## XII.

777. *Extraordinary Expenses of a Partner.* — If in a universal partnership it had been agreed that the daughters' portions should

<sup>1</sup> L. 34, *D. de reg. jur.*; — l. 168, *ead.* See the eighth and the following articles of the second section of *Covenants*.

<sup>1</sup> L. 27, *D. pro soc.*; — l. 12, *ead.*; — l. 82, *D. eod.*

<sup>2</sup> L. 68, *D. pro soc.*; — l. 73, § 2, *ead.*; — l. 81, *ead.*

be taken out of the joint stock, and it happen that one of the partners hath a daughter to marry, and that the others have none, this daughter will nevertheless have her portion out of the joint stock.<sup>a</sup> And this partner will have this advantage over the others, without any injustice, for each of them might have had it. And the state in which they were all of them, under the same uncertainty of the event, and with the same right, having rendered their condition equal, it made also their agreement just.

## XIII.

778. *Unlawful Expenses.* — The expenses which the partners are at in gaming, debauchery, or other unlawful practices, are not to be taken out of the common stock.<sup>o</sup>

## SECTION IV.

## OF THE ENGAGEMENTS OF PARTNERS.

## ART. I.

779. *Unity and Fidelity among the Partners.* — Partners being united by a general engagement,<sup>a</sup> in a sort of fraternity,<sup>b</sup> to act the one for the other as every one would do for himself, they owe reciprocally to one another an upright fidelity and integrity, such as may engage every one of them to share with the others whatever they have belonging to the community, with all the profits, fruits, and other revenues which they may reap from it; and not to keep any thing to themselves, but what they may lawfully do by their contract.<sup>c</sup>

## II.

780. *Care and Vigilance of the Partners.* — Besides the fidelity which the partners owe to one another, they likewise owe their care for the affairs and effects of the community. But whereas their fidelity admits of no bounds, they are obliged, with respect

<sup>a</sup> L. 81, D. *pro soc.*

<sup>b</sup> L. 59, § 1, D. *pro soc.* As to the expenses which are laid out on account of the partnership, see the eleventh article of the following section.

<sup>c</sup> See the twelfth article of the first section.

<sup>d</sup> See the first article of the second section.

<sup>e</sup> L. 52, § 1, D. *pro soc.*; — l. 3, C. *cod.*; — l. 1, in f. D. *cod.*; — l. 38, § 1, *cod.*

to the care which they owe, to use only the same application and vigilance in the common affairs as they use in their own.<sup>d</sup>

### III.

781. *Partners accountable for Fraud, and Gross Faults.* — This duty of care and vigilance which the partners owe to one another, being regulated by the care which they have of what is their own, it does not extend to the greatest exactness that the most careful and diligent persons are capable of; but it is limited to make them responsible for all deceit, and for all gross faults. And if a partner, who takes the same care of the common affairs as he does of his own, falls into some slight fault without any evil intention, he is not accountable for it: and the other partners ought to blame themselves for not having made choice of a more careful partner.<sup>e</sup>

### IV.

782. *Accidents.* — Partners are never responsible for any accident; unless they have given occasion to it by some fault for which they ought to answer. As if a partner has suffered a thing which he had in his custody to be stolen.<sup>f</sup>

### V.

783. *If a Partner appropriates to himself, or converts to his own Use, any Thing belonging to the Community.* — If one of the partners appropriates to himself or conceals any thing belonging to the community, or if he puts it to his own use contrary to the intention of the copartners, he commits a theft,<sup>g</sup> and will be liable to make good their damages. And if, having in his hands some of the money belonging to the joint stock, he lays it out on his own particular affairs, he will be obliged to pay interest for it, as a reparation of damages to his copartners, and as a punishment of his own infidelity.<sup>h</sup>

### VI.

784. *Use of the Common Thing without Fraud.* — If a partner happens to have in his custody, without any fraud, a thing belong-

<sup>d</sup> L. 3, C. pro socio.; — § ult. Inst. de societate.

<sup>e</sup> L. 52, § 3, D. pro soc.; — § ult. Inst. de societ.; — l. 72, D. pro soc.

<sup>f</sup> L. 52, § 3, D. pro socio. See the twelfth article of this section.

<sup>g</sup> L. 45, D. pro soc.

<sup>h</sup> L. 60, D. pro soc.; — l. 1, § 1, D. de usur.

ing to the community, such as any movable thing which he has made some use of, it will not be presumed that, because he had the thing in his custody, and made use of it, therefore he is guilty of theft; but that he, being the owner of it in some part, did make use of his own right, being confident of having the consent of his copartners.<sup>1</sup>

## VII.

785. *Loss or Damage caused by a Partner.* — If by some fault, violence, or other unlawful means, a partner occasions damage to the community, he shall be bound to make it good.<sup>1</sup>

## VIII.

786. *The Service which a Partner does is not compensated with the Loss which he occasions.* — If the same partner who has caused any damage, or who through his fault and negligence has given occasion to some loss, which may be imputed to him, happens in other respects to have procured some profit to the community, the profit which he has procured will not be compensated with the loss which he has occasioned. For he was bound to procure this profit, and consequently cannot compensate it with the loss.<sup>m</sup>

## IX.

787. *The Partner is answerable for the Act of the Person whom he has taken into Partnership for his Share.* — If one of the partners has taken another person into partnership with him for his particular share, and has suffered him to meddle in any affair of the community, he shall be accountable for the act of the said person, and must make good to his copartners the loss which this third person shall have occasioned to the community. For it is his fault that he has made a bad choice, and that he did it without the knowledge and consent of the other partners.<sup>n</sup>

## X.

788. *Loss and Gain occasioned by the Under-Partner.* — If this under-partner happens to have been the author of loss in one re-

<sup>1</sup> L. 51, D. pro soc.

<sup>1</sup> L. 47, § 1; — ll. 48 et 49, D. pro socio.

<sup>m</sup> Ll. 25 et 26, D. pro soc.; — l. 23, § 1, eod. If this loss were not occasioned by some fraud, or other unfair way, if it were small, and the profit were considerable, and wholly owing to the industry of that partner, would this compensation be unjust?

<sup>n</sup> L. 23, D. pro soc.

spect, and of profit in another, the loss and profit will not be compensated together in this case;° no more than in the case of the loss occasioned by the partner who had procured profit, as has been already mentioned in the eighth article, because the act of this under-partner is the act of the partner himself.

## XI.

789. *The Expenses of the Partners.*—The partners recover out of the joint stock all their necessary, useful, and reasonable expenses which regard the community, and which they have been at on account of the common affairs; such as travelling expenses, whatever they have laid out on the carriage of persons or goods, workmen's wages, necessary repairs, and other the like charges. And if the partner who has been at these expenses had borrowed the money upon interest, or having advanced the money himself, his copartners have been backward in reimbursing him, he will likewise recover the interest of the money from the time that he advanced it, although he has not made any legal demand of it. But the partners do not recover the expenses which they have laid out unnecessarily, or for their own pleasure.<sup>p</sup>

## XII.

790. *The Particular Loss of a Partner, occasioned by the Affairs of the Community.*—If a partner suffers any particular loss in doing the business of the community, as if he exposes himself to any danger, and, for instance, in a journey which he makes for the common affairs, he is robbed of his clothes, and of the money which he carries with him for an affair of the community, or for the expenses of his journey, or that he himself is wounded, or any one of his servants; these kinds of losses will be made good to him out of the joint stock; for it was the affair of the community that brought them upon him, and nothing on his part gave occasion to them.<sup>q</sup>

° L. 23, § 1, *D. pro soc.* See the remark on the eighth article.

<sup>p</sup> L. 52, § 15, *D. pro soc.*; — l. 38, § 1, *cod.*; — l. 52, § 12, *cod.*; — l. 27, *D. de neg. gest.*; — l. 67, § 2, *D. pro soc.*; — l. 52, § 10, *cod.*; — v. l. 18, § 3, *D. fam. ercisc.*

<sup>q</sup> L. 52, § 4, *D. pro soc.*; — l. 61, *cod.* See the article that follows, and the last article of the second section of *Proxies*. The sequel of this fifty-second law, § 4, shows that it is to be understood of money that the partner takes along with him for the expenses of his journey, or for the affair of the community: for if the partner were robbed of his own money which he carried with him for his own particular affairs, the loss of it would fall upon himself, because it was for his own affairs that he carried it. And the occasion of

## XIII.

791. *Particular Gains or Losses on Account of the Partnership.* — If it happens that the partner by the occasion of some affair of the community reaps some profit; as if the affairs of the community give him access to a person from whom he receives a favor, or if they give him light into some particular affair in which the community is no ways concerned, and he makes advantage of it: or if, on the contrary, the partnership is to him an occasion of loss, as if the care of the common affairs makes him neglect his own: or if any one out of spite to the society forbears to do him the good offices they were wont to do; these kinds of gains and losses will concern him alone.\* Because these events have for their causes, either the particular conduct of the said partner, or his merit, or his negligence; or some other fault, or some chance: and because the conjuncture which links together these causes with the occasion of the affairs of the community is, as it were, an accident, which does not affect the community, but only the partner to whom these things may have happened.

## XIV.

792. *Loss of Things designed to be put into the Common Stock.* — All the losses of the joint stock are common to the partners. But in order to judge whether the money or other thing which is lost ought to be considered as part of the common stock, it is not enough that it was designed to be put into it, but we must consider the circumstances in which the things are when the loss happens. Thus, for example, if the money which a partner was to furnish for buying of merchandise perishes in his own hands, before he has put it into the common cash, or laid it out on the common concern, the loss is his own. But if this money was to be carried a journey, in order to buy something for the public account, and it happens to be robbed on the way, the community bears the loss of it, although it was not yet laid out on their account; because it

the conveniency which the affair of the community gave him to do his own business ought not to be prejudicial to his copartners.

It is necessary to remark on the fourth section of this fifty-second law, and on the sixty-first law cited on this article, that their disposition corrects the hardship of the last section of the sixtieth law, which says, that a partner who is wounded on occasion of an affair belonging to the community bears the charges of his own cure; and that for this reason, because that although he suffers this expense on account of the community, yet it is not for the community that the expense is laid out.

\* L. 60, § 1, D. *pro socio*.



was on the community's account that it was carried, and the partner's destination of it to the public use was accomplished on his part. So that the money was transported at the peril of the whole community. And in other such like events, the loss falls or falls not upon the community, according to the state of things. And we must discern whether the partnership is already formed; what is the destination of the money, or other thing, that is to be put into the joint stock; what steps have been taken towards putting it in, and the other circumstances by which we may be able to judge if the thing which perishes ought to be considered as being already in the common stock, or as belonging still to the person who was to put it in.<sup>a</sup>

## XV.

793. *Insolvency of a Partner.*—If one of the partners has advanced money, or has entered into some engagement, against which the community ought to indemnify him; every one of the partners must reimburse or indemnify him in proportion to their shares. And if he is not able to recover the share of one of the partners who is insolvent, or cannot for other reasons get payment of him, this share of the deficient partner must be paid by all the other partners. For it was on the community's account that this partner advanced the money, or entered into the engagement; and the losses as well as the gains ought to be shared.<sup>b</sup>

## XVI.

794. *One Partner cannot engage the others unless they have empowered him so to do.*—Partners, even those who are in partnership of their whole estate and goods, can alienate only their own share of the common stock, and cannot by their act bind the community, except in so far as it has empowered them; or as the engagement into which they are entered has been useful, or approved of by the other partners.<sup>a</sup> But if one of the partners is chosen for directing the affairs of the society, and is intrusted with the chief care of them, or if he is set over any particular commerce, or any other affair, the engagements which he enters into will be common to all the partners, in so far as they concern the business with which he is intrusted.<sup>x</sup>

<sup>a</sup> L. 58, § 1, D. pro soc.

L. 67, D. pro soc.

<sup>b</sup> L. 68, D. pro soc.; l. 17, eod.; —l. 16, D. de reb. cred.; —v. l. unic. C. si communis res pign. data sit.; —l. 82, D. pro soc.

<sup>x</sup> L. 14, D. de pact.; —l. 57, D. de verb. signif. See the 357th and 358th articles of the

## XVII.

795. *A Partner cannot take his Capital out of the Common Stock.* — The partners cannot take out of the common stock that which they have put into it, because the whole stock belongs to the community, and cannot be diverted nor diminished but with the consent of all the partners while the partnership lasts.<sup>7</sup> And it is no more lawful for a partner to diminish the common stock, than it is to break off from the partnership unfairly, and with a sinister view.<sup>8</sup>

## XVIII.

796. *Of him who proposes a Partner, and answers for him.* — If one is received into a partnership by order and upon the recommendation of a third person, who proposed him to the partners and who answers for him, this third person will be accountable for the act of the partner whom he recommended, in the same manner as he would be for his own proper act, if he himself were a partner.<sup>9</sup>

## XIX.

797. *Benefit of Partners as to the Payment of what they owe to one another.* — If a partner happens to be indebted to his fellow-partners on account of the partnership, without being chargeable with any misdemeanour or knavery, and is not able to pay all he owes, without being reduced to great necessity, his copartners are obliged, not only out of humanity, but also because of the brotherly tie that is between partners, to have compassion on him, whether their partnership be universal of all their estate and goods, or only particular of certain things. And they ought not to exact rigorously all that he owes them, if he is not able to pay it without being reduced to great extremity. But they ought to make the payment easy to him, whether by taking lands or houses, movables and other effects, at a reasonable price, or dividing the payments, granting delays, or other favors and eases, according to the circumstances. And whatever constraints they should make use of beyond these limits, and contrary to this temperament, may be

ordinance of Blois. See the fifth article of the second section of *Covenants*, and likewise the title of *Partnerships* in the ordinance of 1673.

<sup>7</sup> See the fifth article of this section.

<sup>8</sup> See the third and the following article of the fifth section.

<sup>9</sup> *L. ult. D. pro soc.*

mitigated by the intervention of the judge, according to the quality of the partners, the nature and quantity of the debt, the goods of the debtor, those of the creditor, and other views of the state of things.<sup>b</sup>

## XX.

798. *If the Partner renders himself unworthy of this Benefit.*— This humanity which copartners owe to one another is not due to him who has knavishly made away his effects, that he might avoid payment, or who, to prevent sentence being given against him, disowned the quality of a partner, or has in any other manner of way rendered himself unworthy of such a favor.<sup>c</sup>

## XXI.

799. *This Benefit does not extend to the Sureties, nor to the Heirs or Executors of the Partners.*— The sureties of a partner, those who are bound to answer for what he does, his heirs or executors, and other successors, cannot claim this benefit; because their obligation is quite of another nature; the sureties, and those who are accountable for the act of a partner, being bound, with this view of the partner's proving insolvent, to make good whatever he shall happen to owe; and the heirs, executors, or administrators, having accepted of the succession, cannot lessen the charges of it.<sup>d</sup>

## XXII.

800. *One Partner can do nothing in the Affairs of the Community, against the Will of the other Partners.*— The partners cannot do any thing in the common concerns but what belongs to their charge, or is agreed to by all the partners. And if one partner attempts to make any change, every one of his fellow-partners may hinder him. For among persons that have the same right, those who refuse to admit of any innovation are better founded to oppose it, than they are to innovate who make the attempt. But if the change which a copartner has made has been made in the presence of the others, and they suffered it, they cannot afterwards complain of it, even although it should be to their disadvantage.<sup>e</sup>

<sup>b</sup> L. 63, D. pro soc.; — l. 173, D. de reg. jur. See the ninth and the following articles of the title of Partnerships in the ordinance of 1673.

<sup>c</sup> L. 63, § 7, D. pro soc.; — l. 67, § ult. eod.

<sup>d</sup> L. 63, §§ 1, 2, D. pro soc.

<sup>e</sup> L. 28, D. comm. divid.

## SECTION V.

## OF THE DISSOLUTION OF THE PARTNERSHIP.

## ART. I.

801. *The Partnership is dissolved by the Consent of the Partners.* — As partnership is formed by consent, so is it in the same manner dissolved, and it is free for all the partners to break off their partnership, and to give it over whenever they please, even before the end of the term which it was to have lasted, if they all agree to it.<sup>a</sup>

## II.

802. *Each Partner may break off Partnership when he pleases.* — The tie which is among partners being founded on the reciprocal choice which they make of one another, and on the hopes of some profit, it is free for every one of the partners to break off partnership whenever he pleases; whether it be because there is no good agreement among the partners, or that some necessary absence, or other affairs, make the partnership burdensome to him who is desirous to leave it; or that he does not like a commerce which the partners are about to undertake; or that he does not find his account in the partnership, or for other reasons. And he may give over partnership without the consent of the other partners, and that even before the time at which it was to have ceased, and although it have been agreed that none of the partners should break off the partnership till the time agreed on were expired. Provided that the partner does not break off with some sinister view; as if he quits the partnership that he may buy for himself alone what the whole community had a mind to purchase, so that he may make some other profit, to the prejudice of the other partners, by his leaving them: or provided he does not quit after some business is begun, or at an unseasonable time, which may occasion some loss or damage to the community.<sup>b</sup>

## III.

803. *A Fraudulent Renunciation of Partnership does not free the*

<sup>a</sup> L. 63, § 3, D. pro socio; — l. 5, C. eod.

<sup>b</sup> L. 63, in fine, D. pro soc.; — ll. 14, 15, et 16, eod.; — l. 65, § 4, eod.; — d. l. 65, § 6; l. 5, C. eod.; — § 4, Inst. eod.; — L. 14, D. eod. See the following articles.

*Person who so renounces from his Engagements.*—The partner who breaks off partnership with an unfair design disengages his copartners from all engagement to him, but does not disengage himself from his obligations to them. Thus, he who should withdraw himself from a universal partnership of their whole estate, present and to come, that he alone might inherit a succession fallen to him, would bear the whole loss, if the succession which he alone inherits should prove burdensome; but he would not deprive his copartners of the profit, if the succession should prove advantageous, and they have a mind to share in it. And in general, if a partner breaks off at an unseasonable time, which occasions the loss of some profit to the community, which otherwise it might have made, or which causes any other damage, he will be bound to make it good. As if he quits before the time to which the partnership was to have lasted, abandoning a business with which he was charged. And he who breaks off the partnership in this manner shall have no share in the profits which shall happen to be made afterwards; but he shall bear his part of what losses shall afterwards happen, in the same manner as he would have been bound to do if he had not quitted the partnership.<sup>a</sup>

## IV.

804. *An Unseasonable Renunciation.*—The partner who renounces the partnership at an unseasonable time, not only does not free himself from his engagements to his copartners, but is answerable for all the losses and damages which his unseasonable renunciation may have caused to the society. Thus, if a partner quits whilst he is on a journey, or engaged in any other business for the community; or if his quitting obliges the partners to sell any merchandise before the time; he shall be bound to make good the losses and damages which his leaving the partnership under these circumstances shall have occasioned.<sup>d</sup>

## V.

805. *We are to judge of the Unseasonableness of the Renunciation by the Interest of the whole Community.*—In order to judge whether the partner withdraws himself at an unseasonable time, it is necessary to consider what is most profitable for the whole community, and not for any one of the partners in particular.<sup>e</sup>

<sup>a</sup> L. 65, § 3, *D. pro soc.*; — l. 14, *cod.*; — l. 65, § 6, *cod.* See the following articles.

<sup>d</sup> L. 65, § 5, *D. pro socio*; — l. 14, *cod.*

<sup>e</sup> L. 65, § 5, *D. pro soc.*

## VI.

806. *Profit after the Renunciation.* — If, after a fair and lawful renunciation, the partner who has quitted the partnership begins anew to carry on any commerce from which he reaps some profit, he will not be bound to share it with his former partners.<sup>f</sup>

## VII.

807. *A Fraudulent and Unseasonable Renunciation is never permitted.* — A fraudulent and unseasonable renunciation is never permitted, whether the contract of partnership has provided against it or not. For this would be repugnant to fidelity, which, being essential to the contract of partnership, is always understood to be comprehended in it.<sup>g</sup>

## VIII.

808. *The Renunciation is of no Use till it is known, but is in the mean While prejudicial to him who has made it.* — The renunciation is of no use to the person who has made it, till it be made known to the other partners; and if in the interval after the renunciation, and before it is known to the other partners, he who has renounced makes any profit, he will be obliged to share it with his copartners; but if he suffers any loss, it will all fall upon himself. And if in this space of time the other partners reap any gain, he will have no share in it; and if they suffer any loss, he must bear his part of it.<sup>h</sup>

## IX.

809. *The Term of the Partnership being expired, every one withdraws himself with Impunity.* — The time which the partnership was to last being expired, each partner may withdraw himself without the imputation of having quitted fraudulently, or unseasonably;<sup>i</sup> unless his withdrawing himself should chance to prejudice some affairs which were not then quite finished.

## X.

810. *Partnership is dissolved by Consent.* — Partnership, whether universal or particular, may be dissolved in the same manner as it is contracted, as well among persons absent as present, not only

<sup>f</sup> L. 65, § 3, D. pro soc.<sup>h</sup> L. 17, § 1, D. pro soc.<sup>g</sup> L. 17, § 2, D. pro socio.<sup>i</sup> L. 65, § 6, in f. D. pro soc.

by the express consent of all the partners, but tacitly, by acts which show that they break off their partnership. As if every one of them drives separately the same trade and business which they had before carried on in company together; if the commerce in which they dealt happens to be prohibited; if they engage in a lawsuit, with which it is impossible the partnership can subsist; or if they show by any other signs and tokens that they break off their partnership.<sup>1</sup>

## XI.

811. *The Partnership ceases when the Thing for which it was contracted ceases to be.* — If the partnership was only for a certain commerce, or some particular affair, it is at an end whenever that commerce or that affair is finished. And it would be the same thing if the partnership had relation to a thing that happens to perish, or of which the commerce ceases to be free; as if the partnership was for the farm of some lands taken by the enemy in a time of war.<sup>m</sup>

## XII.

812. *If a Partner becomes incapable of contributing, either in Money or Industry.* — If one of the partners is reduced to such a condition, that he cannot contribute to the community what he is obliged to furnish, whether in money or in labor, the other partners may exclude him from the society; as if his goods are seized on, if he has relinquished them to his creditors, if he labors under any infirmity, or any other inconvenience, that hinders him from acting, if he is excluded from the management of his concerns, as being a prodigal, or if he falls into a frenzy. For in all these cases, the partners may justly exclude from the partnership him who, ceasing to contribute to it, ceases to have a right to it.<sup>n</sup> But this

<sup>1</sup> L. 64, *D. pro soc.*; — l. 65, *cod.*; — d. l. 65, § 7. See the sixth article of the second section.

<sup>m</sup> L. 65, § 10, *D. pro soc.*; — l. 63, § ult. *cod.*

<sup>n</sup> L. 4, in *f. D. pro socio*; — l. 65, § 1; — § 8, *Inst. de societ.* We have not put down in this article what is said in the texts here cited, that the partnership is broken off by the poverty and disorder in the affairs of one of the partners. For according to our usage covenants are not thus annulled, without the act of the parties, and whilst the partners suffer him to continue in the partnership whose goods have been seized on, and even sold, he is still considered as a partner, and has his share in the profits, till he is excluded by the other partners; which they cannot do without reserving to him the rights which he has acquired, or which he cannot be deprived of by the said exclusion.

is to be understood only for the time to come, and the partner who may chance to be excluded for any one of these causes ought to lose nothing of the profits which may come to his share in proportion to the contributions which he had already made.

## XIII.

**§13. *The Guardian of the Prodigal and Madman may break off the Partnership.***—As the partners may break off partnership with a prodigal and a madman, so likewise the guardian of the prodigal and of the madman may renounce the partnership in their names.<sup>o</sup>

## XIV.

**§14. *The Death of a Partner.***—Since the partnership cannot subsist but by the union of the persons who have reciprocally chosen one another, and that it is sometimes supported by the industry of one person alone, the death of one of the partners naturally dissolves the partnership with regard to them all; unless it be that they have agreed that it shall subsist among the survivors; or that, without any such previous agreement, the survivors are willing to continue together in partnership.<sup>p</sup>

## XV.

**§15. *The Civil Death of a Partner.***—The civil death of a partner has the same effect with regard to the partnership as the natural death. For the person being out of a condition of acting, and his goods being confiscated, he is with regard to the partnership as if he were really dead.<sup>q</sup>

## XVI.

**§16. *Sharing of Profits, Losses, and Charges.***—The partnership being ended, the partners reciprocally reimburse themselves of what they have advanced, and share their profits; and if there remain any debts to be paid off by the society, and expenses to be laid out, and any future profits or losses, they take their respective sureties for all these consequences.<sup>r</sup>

<sup>o</sup> *L. ult. C. pro soc.*

<sup>p</sup> *L. 65, § 9, D. pro soc.; — l. 59, eod.* See the last article of the following section. *L. 37, D. pro soc.*

<sup>q</sup> *L. 65, § 12, D. pro soc.; — § 7, Inst. eod.; — l. 63, § ult. eod.*

<sup>r</sup> See the eleventh article of the fourth section. *L. 27, D. pro soc.; — l. 38, eod.; — l. 65, § 13, eod.*



## SECTION VI.

OF THE EFFECT OF THE PARTNERSHIP WITH REGARD TO THE  
HEIRS AND EXECUTORS OF THE PARTNERS.

## ART. I.

817. *Rights and Engagements of the Heir or Executor of a Partner.*—Although the heir or executor enters into all the rights of the person to whom he succeeds,<sup>a</sup> yet the heir or executor of a partner, not being a partner himself, has no right to intermeddle in the affairs of the community in the quality of a partner. Thus, he who succeeds to a partner who was book-keeper to the company, or who was employed in buying things, or doing other business for the service of the company, cannot take upon him any of these functions. But although this heir or executor has not the quality of partner, yet he is with respect to the other partners what those persons are to one another, who have any thing in common together without a covenant. And this gives him a right to inquire into what passes in the community, and to call the other partners to account for the preservation of his own interest. And, in fine, he enters into the rights and engagements which are annexed to the bare quality of heir or executor, as shall be explained by the following rules.<sup>b</sup>

## II.

818. *In what Manner the Heir or Executor shares the Profits and bears the Losses.*—The heir or executor of the partner partakes of the profits which would have fallen to the person to whom he succeeds, whether it be that he had already acquired them by any commerce or affair that was ended, or that they were to arise from some affairs not yet finished; and he ought likewise to bear his share of the charges and losses accruing from the same affairs.<sup>c</sup>

## III.

819. *The Heir or Executor bound to finish what the Deceased*

<sup>a</sup> L. 59, D. de reg. jur.; — l. 9, § 12, D. de her. inst.; — l. 24, D. de verb. sign.; — l. 69, D. de reg. jur.

<sup>b</sup> L. 63, § 8, D. pro socio. See the third article of the second section.

<sup>c</sup> L. 65, § 9, D. pro soc.; — l. 3, C. eod.; — l. 63, § 8, D. pro soc.; — l. 65, § 2, eod.

*was under Obligation to do.*—Although the heir or executor be not a partner, yet he is nevertheless obliged to make good the engagements of the deceased that pass to him; and he ought not only to pay in the contributions, but also to satisfy what other demands may be made on account of the partnership. Thus, if the deceased had in his hands any affair, or any business, of which the management might be transmitted to his heir or executor, he ought to finish what remains to be done, with the same care and the same fidelity that the deceased himself would have been obliged to.<sup>4</sup>

## IV.

820. *The Heir or Executor bound for the Faults of the Deceased.*

—The heir or executor of the partner is likewise bound to the community for the act of the deceased, and for all the loss or damage which the deceased may have occasioned, either by knavery, or by faults which he was to answer for.<sup>5</sup>

## V.

821. *The Partnership is not interrupted by the Death of a Partner, if the said Death is not known.*—If the death of a partner happens before they have begun the business for which they entered into partnership, and the said death is known to the other partners, the partnership is at an end, at least with respect to the person deceased, and his heir or executor; and it is free for the partners to exclude the said heir or executor out of the partnership, as it is for him not to engage in it. But if, the said death, being unknown to the other partners, they begin the business, the heir or executor of the deceased shall have his share in it, and shall succeed to the charges of it, and to the profits or losses which shall arise from it.<sup>6</sup> For the contract of partnership has had this effect, that the ignorance of the death of the partner, and the upright intention of the partners, have made the engagement of the deceased, upon which they had treated, to subsist; and have formed out of it a new engagement, which is reciprocal between the surviving partners and the heir or executor of the deceased

<sup>4</sup> L. 46, D. *pro soc.*; — l. 21, § 2, D. *de reg. neg. gest.*; — l. 35, D. *pro soc.*

<sup>5</sup> L. 35, in fine, et 36, D. *pro soc.*

<sup>6</sup> L. 65, § 10, D. *pro soc.* See the seventh article of the fourth section of *Proxies*.

## VI.

822. *Of Partnership in a Farm, with Respect to the Heirs or Executors of the Partners.*—All that has been said in divers places of this title concerning the dissolution of partnership, whether by the death of one of the partners, or by the will and consent of them all, and touching the manner in which the engagements of the partners descend, or do not descend, to their heirs and executors, is not to be understood indifferently of partnerships in which other persons are interested; such as the partnerships of farmers, or undertakers of any work. For in these kinds of partnerships we must distinguish two engagements; one, of the partners among themselves, and the other, of all the partners to the person of whom they take either a farm, or any thing to do. And since this last engagement descends to the heirs or executors of the partners,<sup>s</sup> it is a consequence of it, that, they being under a common engagement to others, they be mutually engaged to one another. And if this tie does not make them partners, as those are who have voluntarily chosen one another, yet it has this effect; that, for example, the executor or administrator of a farmer being bound to perform the conditions of the lease to the lessor, and having the right to manage the farm, or cause it to be managed for his behoof, this right and this engagement distinguish his condition from that of the executors administrators of other kinds of partners, in that he cannot be excluded from the farm, even although the partners had not begun to manage it before the death of the partner to whom he succeeds.<sup>h</sup>

## TITLE IX.

## OF DOWRIES, OR MARRIAGE PORTIONS.

823. *Two Engagements in Marriage.*—Marriage makes two sorts of engagements; one whereof is formed by the divine institution of the sacrament, which unites the husband and the wife;

<sup>s</sup> See the tenth article of the first section of *Letting and Hiring*;

<sup>h</sup> *L. 59, D. pro socio*; — *l. 63, § 8, eod.*

the other is made by the contract of marriage, which contains the covenant relating to their goods.\*

824. *The Engagement of the Persons.*—The engagement of marriage, in what relates to the union of the persons, the manner in which it ought to be celebrated, the causes which render it indissoluble except in some singular cases, and other the like matters, are not within the design of this book, as has been observed in the plan of matters in the fourteenth chapter of the Treatise of Laws.

825. *The Covenants concerning the Goods.*—As to the covenants about the goods, some of them come within the design of this book, and others not; and in order to distinguish them, we must divide them into three sorts. The first is of those covenants which are not agreeable to the Roman law, although they are in use with us in France, whether it be throughout the whole kingdom, such as the renunciations made by daughters of successions that may happen to fall to them; <sup>b</sup> institutions of heirs or executors by way of contract, and which are irrevocable; <sup>c</sup> or which are peculiar only to some provinces, such as the community of goods between husband and wife. The second is of those which are conformable to the Roman law, but which are only received in some provinces, such as the augmentation of dowries after marriage. And the third sort is of such covenants as are agreeable both to the Roman law and to the general usage of this kingdom, such as those which concern the dowry, or the goods which the wife may have besides her dowry; which the Romans call by the name of *paraphernalia*.

826. It is only this last sort of covenants, which, being both agreeable to the Roman law, and in use with us, is of the number of matters which come within the design of this work. But as to the community of goods between man and wife, jointures, the augmentation of marriage portions, and other matters which are peculiar to some customs, or to some provinces, they have their proper rules in the customs of the places where they are received, and which we are not to meddle with here. We shall only observe, that these matters, as also those of the institutions of heirs or executors by way of contract, and of the renunciations of daughters, have many rules taken out of the Roman law, which

\* These two sorts of engagements are expressed and distinguished in the marriage of Tobias. *Tobit* vii. 13, 14.

<sup>b</sup> L. 3, *C. de collat.*

<sup>c</sup> L. 15, *C. de pact.*; — l. 5, *C. de pact. conv.*

will be found in this book in their proper places, in the matters to which they have relation. Thus many rules of partnership, and of other contracts, may be rightly applied to the community of goods between man and wife, wherever it is in use: and many of the rules of successions, as also of covenants, may be applied to the contracts of marriage which settle inheritances as by will.

827. *The Subject-Matter of this Title.*— There remains, then, for the subject-matter of this title, only the rules of the Roman law which concern the dowry, or marriage portion, and the goods which the wife has besides her portion; among which we shall only set down those rules which are of common use. But we shall not insert among them some particular customs of the Roman law, although observed in some countries; as, for instance, the privilege of the dowry before the creditors of the husband who were prior to the contract of marriage.

828. *The Foundation of the Rules of Dowries.*— The rules of dowries have their foundation in the natural principles of the bond of matrimony, by which the husband and wife make one body, of which the husband is the head. For it is an effect of this union, that the wife, putting herself under the power of the husband, subjects likewise to his dominion her goods, and which go to the use of the society, or partnership, which they form together.<sup>d</sup>

829. *Distinction of the Goods which are Part of the Dowry, and those which are called Paraphernal Goods.*— According to this principle, it would be natural for all the goods of the wife to be comprehended in her dowry, and that she should have none but what enter into this partnership, and of which the husband, who bears the charges of it, should have the full enjoyment. But custom has determined, that the husband shall have for his wife's portion only the goods which are specified to be given on this account; and if the wife does not give as a marriage portion all her goods present and to come, but only certain goods, the dowry will be limited to the goods which are expressly given under this name; and the other goods, which are not specified, will be reckoned paraphernal goods.

830. *A Tacit Condition in Contracts of Marriage.*— We must observe this difference between the covenants in a contract of marriage, and those of other contracts; that whereas all other covenants bind the contracting parties irrevocably, and from the

<sup>d</sup> L. 8, C. de pact. conv.

moment that the contract is formed, the covenants of the contract of marriage are in suspense till the marriage is solemnized; and imply this condition, that they shall not take place but in case the marriage be accomplished; and that they shall remain void if it is not accomplished.\* But when the celebration of the marriage follows the contract, it gives the contract a retroactive effect, and it has its effect from the day of its date. Thus, the mortgage for the security of the dowry is acquired from the date of the contract, and before the celebration of the marriage.

831. *Remarks on the Privileges of Dowries.*—Some may perhaps take notice and find fault in reading this title, that nothing is said in it of some maxims of the Roman law in favor of dowries; such as those which say, in general, that the causes relating to the dowries are favorable, and that it is for the public interest that dowries be preserved;† that in doubtful cases judgment ought to be given for the dowry:‡ and in particular those maxims which relate to dowries certain privileges, such as the privilege among creditors, and the preference even to those that have prior mortgages;§ and that privilege which, in favor of dowries, validated the obligation of a woman who had bound herself for the dowry of another,¶ although by the Roman law women could not be bound for other persons. But as to these privileges, that of the preference of the dowry to the husband's creditors, even to those that have prior mortgages, is received only in some places, and everywhere else it is looked upon as an injustice. And the law which validates the obligations of a woman for another's dowry is useless after the edict of the month of August, 1606, which permits women to bind themselves for others, as has been remarked on the first article of the first section of the title of *Persons*.

832. And as for these general maxims, that the causes of dowries are favorable, that the public is interested in their preservation, and that in doubtful cases judgment ought to be given in favor of the dowry; since they do not terminate in any thing particular except to show that they are privileges of the Roman law, and seeing they may be very readily misapplied, it was not thought proper to set them down here as rules.

\* L. 68, D. de jur. dot.; — l. 70, § 4, eod. \*

† L. 1, D. sol. matr.; — l. 2, D. de jur. dot.

§ L. 70, D. de jur. dot.; — l. 85, D. de reg. jur.; — l. ult. C. de senat. Vell.

¶ L. 18, § 1, D. de rebus auct. jud. possid.; — l. ult. C. qui potiores

• l. ult. C. ad senatus Vell.

833. It is likewise necessary to observe, that in the Roman law there are other regulations in relation to the matter of dowries, which, although they be founded on natural equity, yet we have not thought fit to insert under this title. Thus, we have not put down this rule, that the husband being sued by the wife for the restitution of her marriage portion, or for other matters, or the wife sued by the husband for what she may be indebted to him, they ought not to be constrained with the same severity as debtors for other causes, and cannot be obliged to pay more than what they are able to do, without being reduced to want.<sup>1</sup> And the reason why we have not made an article for this rule is, that in the Roman law it was a consequence of divorce, which was allowed among the Romans, and which is unlawful; and that according to our usage the wife having no action against her husband, nor the husband against the wife, except in the case of a separation from bed and board, or a separation only as to their goods, this rule has no relation either to the one or other of these two cases; and that, in fine, in all the cases where equity requires that the rigor of prosecutions at the instance of creditors should be mitigated, it is customary with us to leave the mitigation of this severity to the discretion of the judge, according to the circumstances. As to which it will be proper to see the twentieth article of the fourth section of *Partnership*.

834. We have also omitted to set down under this title that other rule of the Roman law, and which is likewise founded on a principle of equity, that the fruits of the dowry which are reaped the last year of the marriage ought to be divided between the husband and the wife, in proportion to the time that the marriage has lasted this last year.<sup>m</sup> By this rule, if a marriage had been contracted the first of July, before harvest, and had been dissolved by a divorce the first of November; the husband, who had gathered all the fruits of the year, for four months only that the marriage had lasted, was obliged to restore to the wife two thirds of the fruits. And this last year was reckoned to begin on the day of the year that the marriage was solemnized: or if the husband did not enter into possession of the lands which he had in marriage with his wife till after the solemnization of the marriage, this last year

<sup>1</sup> L. 20, *D. de re jud.*; — § 37, *Inst. de act.*; — l. un. § 7, *C. de rei ux. act.*; — l. 14, in f. *D. sol. matr.*; — l. 12, *D. eod.*; — l. 173, *D. de reg. jur.*

<sup>m</sup> L. 7, § 1, *D. sol. matr.*; — d. l. § 9; — l. 11, *eod.*; — l. 78, § 2, *D. de jur. dot.*; — l. un. § 9, *C. de rei ux. act.*

was reckoned to begin from the same day of the year that the husband entered into possession of his wife's lands.<sup>a</sup> But this rule, which in the case of divorce was necessary for the doing of justice both to the wife and to the husband, is not so necessary in the case of the dissolution of the marriage by the death of one or other of the parties. For whereas in the case of divorce it would have been very unjust, that a woman married just before the beginning of harvest, and divorced as soon as harvest was over, should be stripped of the revenue of her estate for the whole year; in the case of the dissolution of the marriage by the death of the husband or wife, the justice which may be due to either the one or other of them, or to their heirs or executor, is not limited precisely to this rule. And besides this way of dividing the fruits of the wife's dowry between the survivor of the married couple, and the heirs or executors of the deceased, our customs have established other ways altogether different. Thus, in some customs, the fruits of the wife's dowry for the last year go to the husband, subject to the burdens which the said customs make him liable to; and in others, the survivor gathers all the fruits that are hanging by the roots in the estate that is restored, with the burden of paying half the charge of tillage and seed; and in others, again, the fruits are divided into two equal shares. And these different usages have in general their equity founded in this, that those who marry do contract on the conditions of these customs, unless they derogate from them by express clauses. And in particular each usage is founded either upon the uncertainty of the event which may give some advantage to the person who shall survive, or upon other motives which render these partitions just and equitable.

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## SECTION I.

### OF THE NATURE OF DOWRIES, OR MARRIAGE PORTIONS.

#### ART. I.

835. *The Definition of a Dowry.* — A dowry is the goods which a woman brings in marriage to her husband, that he may enjoy them, and have the administration of them during their marriage.<sup>a</sup>

<sup>a</sup> L. 5, et l. 6, D. sol. matr.

<sup>a</sup> L. 1, D. de jur. dot.; — L. 10, § 3, eod.



## II.

836. *The Husband enjoys the Dowry for the Charges of the Marriage.*—The revenues of the dowry are destined to be a help towards the maintenance of the husband, the wife, and their family, and towards defraying the other charges of the marriage. And it is on the account of these charges that the husband has a right to the enjoyment of it.<sup>b</sup>

## III.

837. *In what Manner the Husband is Master of the Dowry.*—The right which the husband has to the dowry of his wife is a consequence of their union, and of the power which the husband has over the wife herself. And this right consists in this, that he has the administration and enjoyment of the goods of the dowry, which the wife cannot take from him; that he may sue at law, in his own name as husband, for the recovery of the goods of the dowry out of the hands of third persons who detain them wrongfully, or are debtors of them;<sup>c</sup> and that he thus exercises, in his own name as husband, the rights, and prosecutes the actions, which relate to the dowry, in such a manner as makes him to be considered as if he were master of the goods, but which does not hinder the wife from retaining the property of them.<sup>d</sup> And it is these several effects of the rights of the husband, and of those of the wife, to the dowry, which make the laws to consider the dowry both as being the goods of the wife, and likewise the goods of the husband.

## IV.

838. *Of the Dowry in Money, or in Things estimated.*—The dowry, consisting of money, or other things, whether movable or immovable, which have been estimated in the contract of marriage at a certain price, is the property of the husband; and he becomes

<sup>b</sup> L. 7, *D. de jur. dot.*; — l. 65, § ult. *D. pro socio*; — l. 20, *C. de jur. dot.*

<sup>c</sup> L. 3, § 5, *D. de minor.*; — l. 7, § 3, *D. de jur. dot.*; — l. 21, § 4, *D. ad municip.*; — l. 11, *C. de jur. dot.*; — l. 49, in fine, *D. de furt.*; — l. 9, *C. de rei vind.*

<sup>d</sup> L. 30, *C. de jur. dot.*; — l. 75, *D. eod.* We have not put down in this article what is said in the texts here cited, that the wife herself cannot bring an action at law for recovery of the goods which are part of her marriage portion; because that by our custom, although the husband may sue in his own name alone, yet the wife may likewise sue, not only when she is separated from her husband, but even although she be not separated, provided that the husband agree to it, and that he empower her to do it, or that, upon his refusal, the judge authorizes her to do it.

debtor for the money given in dowry, or for the price of the things estimated. For this estimation makes it a sale of the things to him; and the dowry consists in the price agreed on.<sup>a</sup>

## V.

839. *The Estimation makes the Thing to be at the Husband's Peril.*— If the things thus estimated happen to be damaged, or to perish during the marriage, it is the husband who, being proprietor of the things, bears the loss of them, as he would reap the profit, if there were any. But the profit and the loss of the things which have not been estimated belong to the wife, who has always retained the property of them.<sup>f</sup>

## VI.

840. *Consequences of this Estimation.*— In the case where the things which are part of the dowry are estimated, the rules concerning them are the same with those which have been explained in treating of the contract of sale. For this estimation is a true sale.<sup>g</sup>

## VII.

841. *The Dowry may be of all the Woman's Estate, or of a Part of it.*— The dowry may comprehend either all the estate of the wife present and to come, or only all the estate she has at present, or a part of it, according as it has been agreed between them.<sup>h</sup> And the goods<sup>a</sup> of the wife which are no part of the dowry are called *paraphernal goods*, of which we shall speak in the fifth section.

## VIII.

842. *Profits of the Dowry which are not Revenues.*— If the husband reaps from the portion which he had in marriage with his wife any profit which may be reckoned a revenue, it belongs to him. But if the said profit is not of the nature of fruits and revenues, it is a capital, which augments the dowry. Thus, the cuttings of coppice-woods, the trees which are taken out of nur-

<sup>a</sup> L. 10, § 4, D. de jur. dot.; — l. 5, C. de jur. dot.

<sup>f</sup> L. 10, D. de jur. dot.; — l. 10, C. eod.; — d. l. 10, D. de jur. dot.; — l. un. § 9, in f. C. de rei ux. act.

<sup>g</sup> L. 10, § 5, in f. D. de jur. dot.; — l. 1 et l. 10, C. eod.

<sup>h</sup> L. 4, C. de jur. dot.; — l. 72, D. eod. toto tit. D. de jur. dot.

series, are revenues. But if the husband fells great trees which the wind has thrown down in a wood, in a warren, or an orchard; if he takes down the materials of an edifice gone to decay, which it is neither useful nor necessary to rebuild; all the profits which arise from these kinds of things, the expenses being deducted, are capital stocks which go to the augmentation of the dowry. And it would be the same thing if there should happen any addition to the lands which are part of the dowry, whether it be in their extent, as if a piece of ground lying near a river happens to receive any accretion from it; or in their value, as if a right of service, or such like, be discovered to belong to them.<sup>1</sup>

## IX.

843. *Stones taken out of Quarries, and other Matters.*—The stones of quarries, and the other matters which are taken out of a ground, such as chalk, plaster, sand, and the like, are revenues which belong to the husband. Whether it be that the said matters appeared at the time of the marriage; or that the husband made the first discovery of them;<sup>1</sup> in which case he recovers the expenses he has been at in putting the ground in a condition of yielding this new revenue.<sup>m</sup> But if these matters are such that they cannot be reckoned among the fruits, and that they do not make a yearly revenue, but a profit to be made only for once, the said profit will be a capital stock, and the dowry will be increased by the profit made out of these matters, the charges being first deducted.<sup>n</sup>

## X.

844. *Lands purchased with the Wife's Portion.*—The lands which the husband purchases with the money he got in marriage with his wife, are not part of the dowry; but the property of the husband.<sup>o</sup>

<sup>1</sup> L. 7, § 12, *D. solut. matr.*; — l. 8, *D. de fundo dot.*; — l. 32, *D. de jur. dot.*; — l. 11, *D. de usufr.*; — l. 4, *D. de jure dot.*

<sup>1</sup> L. 7, § 14, *D. sol. matr.*; — l. 8, *cod.*

<sup>m</sup> L. ult. *D. de fundo dot.*

<sup>n</sup> L. 32, *D. de jure dot.*; — l. 7, § 13, *D. sol. matr.* As to these expenses, see the eleventh and the following articles of the third section, and the seventeenth article of the tenth section of the *Contract of Sale*.

<sup>o</sup> L. 12, *C. de jure dot.*; — l. ult. *C. de servo pig. dat. mat.* The fifty-fourth law, and the twenty-sixth and twenty-seventh laws, *D. de jure dot.*, are to be understood of the purchase made for the wife, as appears by these two last-mentioned laws.

## XI.

845. *The Gains of the surviving Husband or Wife.*—It may be agreed, that the husband surviving the wife shall have a certain profit out of the wife's estate. And this profit may be stipulated, either in case there be children of the marriage, or even in case there happen to be none;<sup>p</sup> and they may likewise regulate some profit for the wife, out of the husband's estate, in case she outlives him.

## XII.

846. *Liberty of all Lawful and Honest Pacts.*—In contracts of marriage, as in all others, the parties contracting may make all manner of agreements, whether relating to the dowry or otherwise, provided that the agreement have nothing in it that is unlawful, dishonest, or that is forbidden by any law or custom.<sup>q</sup>

## XIII.

847. *The Husband cannot alienate the Lands he got in Marriage with his Wife.*—The lands which the husband got in marriage with his wife can neither be alienated, nor mortgaged by the husband, even although the wife should consent to it.<sup>r</sup>

## XIV.

848. *Neither can he subject them to Services or other Burdens.*—The prohibition of alienating the lands which are the wife's portion includes that of subjecting them to services, or suffering those due to them to be lost, and of making their condition worse any other way.<sup>s</sup>

<sup>p</sup> *L. un. § 6, C. de rei ux. act. ; — l. 19, C. de donat. ante nupt. ; — l. 12, D. de pact. dot. ; — l. 2, 26, cod. ; — l. 1, D. de dote præleg. ; — v. l. 9, C. de pact. convent. ; — et Nov. 97, c. 1, de æqual. dot. et propt. nupt. don. et augm. dot.*

It is to be remarked on this article, that the customs of places regulate differently the gains as well of the husband as of the wife; and these gains regulated by the customs are acquired of right, although there were no express agreement about them.

<sup>q</sup> *L. 1, § ult. C. de rei ux. act.* See the twentieth article of the first section of the *Rules of Law*.

<sup>r</sup> *L. un. § 15, Cod. de rei ux. act.* This article is to be understood according to the usage of the countries where the wife cannot alienate her dowry. But she may alienate it in some countries, with the husband's consent. It is necessary likewise to observe, that, in some countries, the wife cannot so much as bind herself, even with the consent of her husband; which preserves her whole dowry entire to her, whether it consist in movables or immovables.

<sup>s</sup> *L. 5, D. de fund. dot.*

## XV.

849. *Exception for the Alienating of the Dowry.*—If during the the marriage there happens any extraordinary case, which may require the alienation of the wife's dowry, such as that of redeeming out of captivity, or out of prison, the husband, the wife, or their children, or other necessary causes; in such cases the alienation may be permitted by a decree of court, the judge inquiring into the merits of the cause, and into the circumstances.<sup>1</sup>

## XVI.

850. *The Settlement of the Dowry implies the Condition that the Marriage shall be accomplished.*—All settlements of dowries imply the condition that the marriage shall be accomplished. And the covenants relating to the dowry, as all the other covenants in a contract of marriage, are annulled, if the marriage is not solemnized, or if for some cause it be declared null and void.<sup>2</sup>

## SECTION II.

## OF THE PERSONS WHO GIVE THE DOWRY, AND OF THEIR ENGAGEMENTS.

## ART. I.

851. *The Father endows his Daughter.*—The daughter who marries ought to be endowed by her father, if he be alive. For the duty of the father to take care of his children, and to provide for them, implies that of giving the daughter a marriage portion.<sup>3</sup>

<sup>1</sup> L. 73, § 1, *D. de jur. dot.*;—v. l. 20, *D. sol. matr.*;—l. 21, *D. solut. matr.* We do not express in this article all the cases wherein these laws permit the employing a part of the marriage portion, and even the whole portion. For our usage in this particular is more reserved: and some customs have restrained the permission of alienating the dowry to the necessity of providing sustenance for the family, or to delivering the husband out of prison. So that we thought it proper to add to this rule the temperament of this judicial permission, after full cognizance of the matter; as is the usage with us.

<sup>2</sup> L. 68, *D. de jur. dot.*;—l. 10, § 4, *ead.*;—l. 3, *D. de jur. dot.*

<sup>3</sup> L. 7, *C. de dot. prom.*;—l. 19, *D. de ritu nup.*;—v. Nov. 115, c. 3, § 11.

What is said in this last text concerning the marriage of daughters against the will of their fathers, makes it necessary to observe the disposition of the edict of 1556, and of the other ordinances, which forbid the marriages of children without the consent of their parents; of sons, till they attain the age of thirty years, and of daughters till the age of twenty-five. See *Exod.* xxii. 17; xxxiv. 15;—*Deut.* vii. 3.

## II.

852. *The Maid, or Widow, that is from under her Father's Jurisdiction, settles her own Dowry.* — When a maid, or widow, that is no longer under the jurisdiction of her father, marries, she settles her own dowry, and stipulates the conditions of it.<sup>b</sup>

## III.

852½. *The Settlement of the Dowry of a Maid that is a Minor.* — When a young woman under age marries after the death of her father, seeing she is mistress of her own estate, although under the care of a tutor, or guardian, yet it is she herself that settles her dowry, with the consent and approbation of her tutor, or guardian.<sup>c</sup>

## IV.

853. *If the Father endows his Daughter, it is presumed to be out of his own Estate, and not out of what the Daughter may have of her own besides.* — If a father, whose daughter has an estate of her own, which she inherited of her mother, or some other person, and of which the father has the management, as being his daughter's tutor or guardian, settles on her a marriage portion, without specifying whether it is out of the daughter's proper estate or his own; he is reputed to give it, not as tutor or guardian, to his daughter, but as her father, and because of the duty incumbent on him to endow his daughter, and that out of his own estate. And it would be the same thing, although this daughter were already emancipated.<sup>d</sup>

## V.

854. *The Dowry given by the Father is called "Dos Profectitia."* — The dowry which the father gives his daughter out of his own estate is, with respect to him, distinguished in the Roman law by the name of *Dos Profectitia*, because it is from the father that it proceeds.<sup>e</sup>

## VI.

855. *Reversion of the Dowry which proceeds from the Father.* —

<sup>b</sup> Tot. tit. *D. de jur. dot.*

<sup>c</sup> *L. 28, C. de jur. dot.*

<sup>d</sup> *L. 5, § 12, D. de jur. dot.*; — *l. ult. C. de dotis promiss.*

<sup>e</sup> *L. 5, D. de jur. dot.*; — *d. l. 5, § 11, D. de jur. dot.*

The dowry which proceeds from the father returns to him, if he survives his daughter, and she dies without children.<sup>f</sup>

## VII.

856. *The Foundation and Use of this Right.*—This right of reversion of the dowry is preserved to the father, although the daughter had been set at liberty from under the father's jurisdiction by emancipation. For this right is not annexed to that kind of paternal authority which is lost by emancipation, but to the natural right which is inseparable from the name of father:<sup>g</sup> and that it may be as a comfort to him under the loss he sustains by his daughter's death.<sup>h</sup>

## VIII.

857. *The Dowry which comes from the Father is subject to the Profits due to the Husband.*—This right of reversion does not hinder the husband from retaining out of the dowry which came from the father that which belongs to him as his profit, according as it has been agreed on;<sup>i</sup> or as the matter is regulated by the customs of the places.

## IX.

858. *If the Father is Mad, or a Prodigal.*—If the father were put under the care of a guardian, as being out of his senses, or as being a prodigal, or for other causes; or if he were absent, or in any other condition which should oblige the magistrate to take care of the marriage and endowment of his daughter; the marriage portion which she receives out of her father's estate will be

<sup>f</sup> L. 6, D. de jur. dot.; — l. 4, C. soluto matr.; — l. 2, C. de bon. que lib.; — l. 40, D. sol. matr. If the daughter who is endowed by her father dies without children, and makes a testament, will the right of reversion hinder the effect of the daughter's disposition, so that the father may take back the whole portion? V. l. 59, D. sol. matr. It would seem by this law, that the daughter might dispose of it by will. Which must be understood of that proportion of it which she may give away without encroaching on the legitime, or legal portion due to the father.

<sup>g</sup> L. 5, § 11, D. de jur. dot.; — l. 10, D. sol. matr.

<sup>h</sup> L. 6, D. de jur. dot. We insert this article to show, by the reason of the law from whence it is taken, that the mother, and the ascendants on the mother's side, ought not to be distinguished from the father as to this right of reversion. See the eleventh article of this section, and the remark on it. As to emancipation, which is mentioned in this article, see the fifth and sixth articles of the second section of *Persons*.

<sup>i</sup> L. 12, D. de pact. total.

considered as a dowry proceeding from the father, and settled by him on his daughter.\*

## X.

859. *The Dowry coming from the Grandfather, and other Ascendants on the Father's Side.*—All that has been said of the father, with respect to the dowry coming from him, and reverting to him, is likewise to be understood of the grandfather, and other ascendants on the father's side.<sup>1</sup>

## XI.

860. *Reversion to Strangers.*—All persons, parents or strangers, may give a marriage portion.<sup>m</sup> But they have not the right of reversion, unless they have stipulated it. For it is a free and irrevocable gift which they have been pleased to make.<sup>n</sup>

## XII.

861. *What the Father owes to the Daughter is not considered as a Dowry coming from him.*—If the father endows his daughter only out of what he has of hers, or was obliged to give her, as if a stranger had given a sum of money to the father, on condition that he should lay it out as a portion for his daughter, this dowry will not be considered as coming from the father;<sup>p</sup> but it will be reckoned a portion proceeding from another person, and the daughter's own patrimony. And it would be the same thing, if the father was indebted to the daughter on any other account.<sup>q</sup>

## XIII.

862. *Dowry settled by the Mother.*—Although it be a duty

\* L. 5, § 3, *D. de jur. dot.*; — d. l. 5, § 4.

<sup>1</sup> L. 5, *D. de jur. dot.* See the remark on the following article.

<sup>m</sup> L. 41, *D. de jure dot.*

<sup>n</sup> L. 24, *C. de jur. dot.*; — l. un. § 13, *C. de rei ux. act.* Why should not the mother, and the ascendants by the mother's side, have the right of reversion, which they seem to be excluded from by this thirteenth section, which ranks them in the number of strangers? Have not they the same reasons as the father. *Ne filiae amissæ, et pecuniæ damnum sentiret.* L. 6, *D. de jure dot.* Our customs deprive the ascendants of the successions of their children in estates of inheritance, which they do not suffer to ascend, for fear they should pass from one line to another. But they preserve to the mother, and the other ascendants on her side, the right of reversion in the same manner as to the father. See the seventh article of this section.

<sup>p</sup> L. 5, § 9, *D. de jur. dot.*

<sup>q</sup> D. l. 5, § 11



properly incumbent on the father to endow his daughter, and he cannot endow her out of the mother's estate;<sup>†</sup> yet if the mother has goods which are no part of her own dowry, she may endow her daughter out of them. And if the father is not able to give a portion to his daughter, the mother may in that case endow her out of her own dowry, observing the temperaments which the customs prescribe in the like cases.<sup>‡</sup>

## XIV.

863. *Warranty of the Dowry.* — The persons who give a dowry, or marriage portion, whether it be in money, land, or things of another nature, can no more dispose of what they have once given away, or promised; and they are obliged to warrant the lands that are given, the debts that are transferred, and the other things, according to the agreement made, or according to the rules of warranty which those persons are bound to who sell or transfer any thing.<sup>§</sup>

## SECTION III.

OF THE ENGAGEMENTS OF THE HUSBAND WITH RESPECT TO THE DOWRY, AND OF THE RESTITUTION OF THE DOWRY.

## ART. I.

864. *The Husband's Engagement to bear the Charges of the Marriage.* — The husband having the dowry in his power, with a right to enjoy it, that he may bear the charges of the marriage, in maintaining himself, his wife, and family; the first of his engagements, with relation to the dowry, is to bear these charges.<sup>¶</sup>

<sup>†</sup> L. 14, C. de jur. dot.; — l. 2, D. de jure dot.

<sup>‡</sup> Nisi pater aut non sit superstes, aut egens est. L. pen. D. de agn. et alend. lib. Although these last words do not properly belong to the present subject, yet they may be applied to it. There are some customs, which, although they do not allow a married woman to alienate her dowry, nor to bind herself by an obligation, yet they suffer her to lay out a certain part of her own dowry in the endowment of her daughter, if the father hath not wherewithal to endow her.

<sup>§</sup> L. 22, C. de jur. dot.; — l. 17, eod.; — l. 1, C. de jur. dot.; — l. un. § 1, C. de rei ux. act.; — § 29, Inst. de act.

<sup>¶</sup> L. 7, D. de jur. dot.; — l. 20, C. eod.

## II.

865. *Of the Care which the Husband ought to take of the Effects pertaining to the Dowry.* — Seeing the husband enjoys the dowry, and has it in his possession, as much for his own interest as his wife's; he ought to take the same care of it as he does of his own affairs and his own proper goods. Thus he ought to sue the debtors, repair and cultivate the lands and tenements, and in general have a watchful eye over every thing that relates to the preservation of the effects pertaining to the dowry. And if through his fault, or negligence, there happen losses and diminutions, or he commits waste on the estate, he shall be bound to make them good;<sup>b</sup> as likewise to make good the accidents which may be occasioned through faults for which he is accountable.<sup>c</sup>

## III.

866. *Diligence against the Debtors.* — Although the husband be obliged to sue the debtors who have in their hands any part of his wife's portion, and if he neglects to enter his action when it is free for him to do it, he is bound to make good all that shall happen to be lost through his negligence; yet nevertheless, if the debtor of the dowry is the father, or a donor, we ought not to require of the husband that he should use the same diligence against them which he ought to use against a stranger. But it is reasonable in this case to give some grains of allowance, according as the circumstances may require.<sup>d</sup>

## IV.

867. *If the Husband innovates the Obligation, it is at his own Peril.* — If a husband changes the nature of a debt pertaining to the dowry, by innovating the obligation, this change will be at

<sup>b</sup> L. 5, § 2, *D. commod.*; — l. 23, *D. de reg. jur.*; — l. 17, *D. de jur. dot.*; — l. ult. *C. de pact. conv.*; — l. 33, *D. de jur. dot.* See the following article. L. 7, § 12, *D. solut. matrim.*

<sup>c</sup> L. 66, *D. solut. matrim.*

<sup>d</sup> L. 20, § 2, *D. de pact. dot.*; — l. 33, *D. de jur. dot.* We have thought proper to qualify this rule in the manner that it is set down in this article. For our usage is not in this particular so indulgent to the husband as this thirty-third law, *D. de jure dot.*, seems to be. And if, on one hand, it would be too hard to oblige the husband to sue against a father-in-law, or against a donor, the most rigid severity for recovering the debt; so, on the other hand, it would not be just that he should be absolutely excused from using any manner of diligence at all. So that it is necessary to apply some temperament, which may regulate his conduct according to the circumstances. See the twentieth article of the fourth section of *Partnership*.

his own peril, and he will remain charged with the debt, as if he had received it.\*

## V.

868. *If the Husband receives Interest from a Debtor of the Dowry.*—The husband who receives interest from a debtor of the dowry, delaying on that account to call in the principal sum which he might have demanded, will be answerable for the debt, if the said debtor becomes insolvent.<sup>†</sup>

## VI.

869. *How Prescription may be imputed to the Husband.*—If the lands or tenements which are part of the dowry be possessed by a third person, and the husband suffers the whole time limited for prescription to run out, he shall be answerable for it. Unless it be that at the time of the marriage the prescription was very near being accomplished, and that there remained so little time to run, that the husband could not be blamed for not interrupting a prescription which was acquired without his knowledge.<sup>‡</sup>

## VII.

870. *The Case of Restitution of the Dowry.*—The last engagement of the husband is to restore the dowry, whenever the case happens that it ought to be restored. As if the wife dies without children before the husband; if the marriage is declared null and void; if they are divorced, or separated from bed and board; or if the wife obtains a separation of goods only because of the husband's poverty; if the dowry was given to the husband at the time of espousals, and the marriage was not accomplished. And when the husband dies, his engagement to restore the dowry passes to his heirs, executors, or administrators.<sup>§</sup>

## VIII.

871. *Accessions of the Dowry.*—The restitution of the dowry extends not only to what has been delivered to the husband as the dowry, but likewise to all the accessions which may have aug-

\* L. 35, D. de jure dot. See the title of *Novations*, in order to know what is meant by innovating a debt; and notice has been already taken of it in the *Plan of Matters*.

† L. 71, D. de jure dot.

‡ L. 16, D. de fundo dot.

§ L. 240, D. de verb. sign.;—l. 2, D. sol. matr.;—l. 24, eod.;—l. 29, C. de jure dot. See the fifth section of the *Separation of Goods*.

mented the capital of the dowry, and which ought not to belong to the husband. Thus the augmentations of the nature of those which have been mentioned in the eighth and ninth articles of the first section, are to be restored with the dowry.<sup>1</sup>

## IX.

872. *To whom the Dowry ought to be restored.* — When the case of restoring the dowry happens, it ought to be restored either to the wife, if she has survived her husband, and be of age to receive it; or to her heirs, executors, or administrators, or to her father, if it was he that settled it, or to the other persons to whom the dowry may appertain.<sup>1</sup>

## X.

873. *The Husband's Gains diminish the Restitution of the Dowry.* — If it has been agreed in the contract of marriage, or if it be regulated by custom, that the husband surviving should retain a part of the dowry, the restitution will be diminished in so much.<sup>2</sup>

## XI.

874. *Repairs and other Expenses lessen the Dowry.* — The restitution of the dowry is also lessened by the repairs, and other charges which the husband, or his heirs, executors, or administrators, have been at in preserving the effects of the dowry, according to the nature of those disbursements, and the rules which follow.<sup>3</sup>

## XII.

875. *Three Sorts of Expenses.* — The expenses which the husband, or his heirs, executors, or administrators, may have been at, of three sorts. Some are necessary, such as those which are laid out in repairing a building which is ready to fall, and which ought to be preserved. Others are useful, although not necessary, such as the planting of an orchard. And there are some which are neither necessary nor useful, and which serve only for pleasure; such as paintings, or other ornaments.<sup>4</sup>

<sup>1</sup> L. 52, D. de jur. dot.

<sup>2</sup> L. 2, D. sol. matr.; — l. 10, eod.; — l. 8, D. de jure dot.; — l. un. § 13, C. de rei ux. act.; — l. 2, C. de jure dot.

<sup>3</sup> See the eleventh article of the first section.

<sup>4</sup> See the following articles.

<sup>5</sup> L. 1, D. de imp. in res dot. fact.; — d. l. 1, § 1; — d. l. 1, § 3; — l. 3, § ult. et l. 6, eod.; — l. 7, eod.

## XIII.

876. *Necessary Expenses.* — For the necessary expenses, the husband may retain the lands or tenements pertaining to the dowry, or a part of them, according to their value; and may keep possession of them till he is reimbursed; and this is the reason why this sort of expenses is said to lessen the dowry.<sup>p</sup> For it is in effect lessened by the necessity of cutting off from it that which is due to the husband, on the account of an expense without which the lands or tenements might have gone to ruin, or been damaged, or diminished, and which the husband was obliged to lay out, that he himself might not be made accountable for the loss that should happen.<sup>q</sup>

## XIV.

877. *The Husband bears the Charges of the Annual, and Ordinary Expenses.* — The expenses which are laid out daily, and of course, either on the preservation of the lands and tenements, such as the lesser repairs of a house, or for cultivating the lands, such as tilling and sowing, or gathering in the fruits, are taken out of the fruits themselves, and out of the other revenues, and are a charge on them. For the fruits and revenues are understood only to be that which remains of clear profit, after deduction of the expenses that have been necessarily laid out in order to be able to enjoy. So that the husband does not recover these kind of expenses. But he recovers those which pass the bounds of what is necessary for preserving the lands and tenements in good case, and for enjoying them.<sup>r</sup>

## XV.

878. *The Ground-charges are taken out of the Fruits.* — The ground-charges, such as quitrents, land-taxes, and other dues which are charges on the fruits, are taken out of the fruits.<sup>s</sup>

## XVI.

879. *Useful Expenses, how they are recovered.* — The expenses which are useful, although not necessary, ought to be repaid to

<sup>p</sup> L. 56, § 3, *D. de jure dot.*; — l. 1, § 2, *D. de imp.*; — l. 5, *cod.*

<sup>q</sup> L. 4, *D. cod.* See the sixteenth article, and the remark upon it.

<sup>r</sup> L. 3, § 1, *D. de imp.*; — l. 7, § ult. *D. sol. matr.*; — l. ult. *D. de imp.*; — l. 15, *D. cod.*; — l. 12, *cod.*; — l. 7, *D. sol. matr.*

<sup>s</sup> L. 13, *D. de imp.*; — l. 27, § 3, *D. de usufr.*

the husband, or his heirs, executors, or administrators. And although these expenses have been laid out without the wife's consent, yet they have their action for recovering them.

## XVII.

§80. *How we are to judge of the Necessity or Usefulness of the Expenses.*— Since there may arise difficulties about determining what expenses are necessary, or not, and what are useful, or not, it is to be left to the prudence of the judge to decide this matter according to the circumstances. And this depends on divers views, and on the regard that is to be had to the quality of the lands and tenements, and other things on which the expenses have been laid out, as if it is to preserve or to better a house, or to recover a debt; to the quality of the repairs and other changes; to the convenience or inconvenience that may follow from thence; to the proportion that may be between the expense and the improvement; and to other considerations of the like nature. Thus, for instance, if for the cultivating of a country farm it is necessary to build a barn to it, or some other edifice, this may be reckoned a necessary expense; and if there is in a house a place fit for making a shop in, this may be reckoned a useful expense."

*L. un. § 5, C. de rei ux. act.; — l. ult. D. de fund. dot.* See the thirteenth article of this section. It is to be remarked on the said thirteenth article, and on the present, that what has been said on the thirteenth article touching the right which the husband has to detain the necessary expenses, and what is said in the present article of the action which the husband has for recovering the expenses which are only useful, ought to be understood according to our usage; which is such, that, of what nature soever the expenses be, whether useful or necessary, the husband, who in this quality was in possession of the estate pertaining to the dowry, cannot be dispossessed, nor his heirs, executors, or administrators, against their will, but by authority of justice. And this is likewise observed, although there should be no reimbursement of expenses due; and this was also the practice under the Roman law. *L. 9, C. solut. matr.* And this is the rule for all possessors, that they cannot be turned out of possession but by authority of justice. See the fifteenth article of the sixth section of *Covenants*. But as to what concerns the reimbursement of the husband, and the right he has to detain the dowry for the expenses, it depends always on the prudence of the judge to determine whether the husband, or his heirs, executors, or administrators, ought to remain in possession till they are reimbursed. And this they are to judge of by the circumstances; such as the quantity of the expenses, the value of the lands and tenements; the security which the husband, or his heirs, executors, or administrators, may have some other way; the value of the fruits; whether the enjoyment of some part of the fruits may not suffice for their reimbursement; the quality of the persons and of their estates; and other circumstances of the like nature.

"*L. 15, in f. D. de imp. in res dot.; — l. 7, § ult. D. sol. matr.; — l. 6, D. de imp. in res dot. f.*

## XVIII.

881. *If the Repairs perish by Accident.* — If it so fall out that the repairs perish through some accident, the husband, or his heirs, executors, or administrators, will nevertheless recover the charges they were at in making them. Because the work entitled them to the recovery of the expenses which they laid out on it; and the property of the repairs belonging to the wife, it is she that bears the loss of them.\*

## XIX.

882. *Expenses for Pleasure.* — The expenses which are laid out merely for pleasure, without either necessity or usefulness, are not recoverable, even although the wife had engaged the husband to lay them out. For he ought to blame himself for an expense which he had a mind to throw away.

## XX.

883. *Repairs for Pleasure.* — If the repairs made for pleasure are such, that they can be taken away without being destroyed, the husband, or his heirs, executors, or administrators, may take them away, in case of a refusal to reimburse them of the charges which they have been at in making them. But if they are of such a nature that they can be of no use when taken away, such as painting in fresco, it is not permitted to deface them. For this would be doing harm without reaping any profit.†

## SECTION IV.

## OF THE PARAPHERNAL GOODS.

884. *Which are the Paraphernal Goods.* — The paraphernal goods are all those which the wife does not give to her husband as part of her dowry;‡ whether it be that she expresses what she reserves to herself, or that she specifies what she is willing only to give as part of her dowry. For whatever she has over and above is paraphernal.

\* L. 4, D. de imp.

† L. 11, D. de imp.; — l. un. § 5, C. de rei uror. act.

‡ L. 9, D. de imp.; — l. un. § 5, C. de rei ur. act.

§ L. 9, § 3, D. de jur. dot.

885. Thus, when the wife gives to her husband in marriage only all the estate which she has at present, or some particular goods, the remainder which she either has at present, or may afterwards have, by inheritance or otherwise, will be paraphernal. But if she gives in marriage all her estate present and to come, in that case she can never have any paraphernal goods.

886. The difference between the dowry and the paraphernal goods consists in this, that whereas the revenues of the dowry belong to the husband, the revenues of the paraphernal goods are the wife's own: and she may dispose of the said revenues, and of the principal itself, without the authority of her husband.

887. This nature of the paraphernal goods, which are no part of the dowry, together with the liberty given to the wife to dispose of the revenues of the said estate, without consulting her husband or asking his consent, seems to have something in it contrary to the principles of their union. For, as the husband is the head of the wife, and has the charge of the family, it would seem just that he should be master of all the revenues of his wife's estate; which, as well as those of the husband, ought to be employed for the common use of man and wife, and of their family; and this liberty which the wife has of enjoying a separate estate independently of her husband is likewise an occasion sometimes of troubling the peace and tranquillity which the marriage union requires. And we see likewise, that, in the same law of the Romans which takes away from the husband all right over the paraphernal estate, it is owned to be just that the wife, putting herself under the conduct of her husband, should likewise intrust him with the management of her estate.<sup>b</sup> However, both the Roman law and our customs have received the usage of paraphernal goods; some of them having only regulated that, if in the contract of marriage the wife does not specify what goods she intends to allot for her dowry, all the estate which she is seized or possessed of at the time of the contract is to be reputed as her dowry.

888. There are again others, which have so favored the use of paraphernal goods, and the liberty of wives to dispose of them, that, although the same customs do not allow the wife either to alienate or to mortgage her dowry, not even with the consent and approbation of her husband, yet they allow her to enjoy and to

<sup>b</sup> L. 8, C. de pact. conv.



dispose of her paraphernal goods, not only without the authority, but even without the consent, of her husband. And this disposition is favorable in the said customs as well as in the provinces which are more particularly governed according to the civil law, where it is observed. Because, the community of goods between the husband and wife not being received in use there, seeing the wife has not the profit either of the revenues of her own portion, which belong to the husband, nor of the estate which he may acquire during the marriage, they leave her the liberty to augment her own estate by the profits which she may be able to make of her paraphernal goods.

## ART. I.

889. *Definition of the Paraphernal Goods.*—The paraphernal goods are all the goods which a married woman has, besides those which have been given with her in marriage to her husband. And these goods are, as it were, a sort of *peculium*, or private possession, which the wife reserves to herself over and above her dowry, which goes to the husband.<sup>a</sup>

## II.

890. *The Wife may dispose of her Paraphernal Goods.*—The wife may dispose of her paraphernal goods, without the authority and consent of her husband; and may put them to what use she pleases, the husband having no right to control her, even although she had delivered them into his custody.<sup>b</sup>

## III.

891. *In what Manner the Wife may enjoy her Paraphernal Goods.*—As the wife may enjoy and dispose of her paraphernal goods, so she may either enjoy them herself, or by other persons, or leave the enjoyment of them to her husband, for their common use, and that of their family. And if the said goods consist in rents, or in debts, she may either herself, or by other persons, take up the principal sums, the rents, and interest, if any is due, or leave it to her husband to recover them, she giving him the necessary powers for doing it.<sup>c</sup>

<sup>a</sup> L. 9, § 3, *D. de jur. dot.*; — l. 31, § 1, *D. de donat.*; — l. 8, *C. de pact. conv.*

<sup>b</sup> L. 8, *C. de pact. conv.*; — l. ult. *cod.*

<sup>c</sup> L. ult. *C. de pact. conv.*

## IV.

892. *If the Paraphernal Estate consists in Movables.* — If the paraphernal estate, or a part of it, consists in rents, debts, or in movable effects, the wife may either keep them in her own custody, or put them into the hands of her husband, getting him to sign an inventory of them, as an acknowledgment of the receipt of the goods.<sup>d</sup>

## V.

893. *The Husband's Care of the Paraphernal Goods delivered to him.* — If the paraphernal goods are put into the husband's custody, he is obliged to take the same care of them as of his own goods, and he will be made accountable for the faults that are inconsistent with this care.<sup>e</sup>

## VI.

894. *How these Goods are distinguished from the Goods of the Dowry.* — The paraphernal goods are distinguished from the goods of the dowry by the contract of marriage, which ought to express what goes to the dowry. And all the goods which are not comprehended in the dowry, either expressly or tacitly, are reckoned to be paraphernal, even although the wife should deliver them to the husband, together with the goods of her dowry; unless it should appear, at the time of the delivery, that the said goods were only an accessory with which the wife intended to augment her dowry.<sup>f</sup>

## VII.

895. *What the Wife is possessed of without an apparent Title belongs to the Husband.* — We ought not to reckon in the number of the paraphernal goods, nor of the other goods of the wife, those which she may chance to have in her custody, or which she may pretend to belong to her, unless it appear that she has a just title to them; as if she has acquired them by inheritance, or gift, or that she was possessed of them at the time of her marriage. And all the other goods which she may chance to have, of which the title does not appear, and it is not known whence she had them, belong to the husband. For otherwise it must be presumed that

<sup>d</sup> L. 9, § 3, in f. *D. de jur. dot.*; — d. § 3; — v. l. ult. *C. de pact. conv.*

<sup>e</sup> L. ult. in f. *C. de pact. conv.*; — l. 9, § 3, in f. *D. de jur. dot.* See the second article of the third section of this title.

<sup>f</sup> L. 9, §§ 2 et 3, *D. de jur. dot.*

the wife has come by these goods only by cheating her husband, or by other unlawful ways.<sup>s</sup> And even the profits which she may happen to make by her frugality, her labor, and industry, belong to the husband, as fruits and revenues, and<sup>a</sup> as services or offices which the wife owes to the husband.<sup>b</sup>

## SECTION V.

### OF THE SEPARATION OF GOODS BETWEEN THE HUSBAND AND WIFE.

896. *The Connection between this Matter and that of Dowries.*—The separation of goods between the husband and wife is one of the causes of the restitution of the dowry. And therefore, this matter being an accessory to that of dowries, the rules concerning it shall be explained in this section.

897. The separation of goods is made in two cases. The first is, when the wife procures a separation from her husband's bed; because of his cruel usage of her; for a separation from the husband's bed implies a separation of goods. And the second is, when the disorder of the husband's affairs obliges the wife to take back her own estate.

898. The separation from the husband's bed is a matter which does not come properly within the design of this book; it being altogether different in our usage from that which was the effect of a divorce under the Roman law. And we shall only treat here of the bare separation of goods.

#### ART. I.

899. *Definition of the Separation of Goods.*—The separation of goods between the husband and wife is the right which the wife has to take her effects out of the husband's hands, that she may manage and enjoy them herself, when the state of the husband's affairs exposes the wife's effects to danger.<sup>a</sup>

#### II.

900. *Cause of the Separation of Goods.*—Seeing the wife is subject to the husband, and that her dowry, and the other goods

<sup>s</sup> L. 51, D. de donat. inter vir. et ux. §. 1. L. 6, C. eod.

<sup>b</sup> L. 48, D. de oper. libert.

<sup>a</sup> This definition follows from the subsequent rules.

which she may have brought to her husband, are left with him on condition that he bear the charges of the marriage; she cannot demand the separation of goods, except when the disorder of the husband's affairs puts him out of a condition of being able to bear the said charges, and that the goods which he has of his wife's are in danger. Thus, the separation ought to be decreed in a court of justice, after hearing the cause, and upon sufficient proof that the bad condition of the husband's affairs, and the smallness of his estate, put the goods of the wife in danger.<sup>b</sup>

### III.

901. *Effect of the Separation.*—The separation of goods being granted to the wife only because her goods were in danger, and because the husband was not able to bear the charges of the marriage; the engagement of the husband to manage the goods of the wife, and to bear these charges, passes to the wife by the separation of goods. So that she takes upon her again the administration of her own goods, and bears these charges, employing her revenues for the maintenance of her husband, herself, and their children.<sup>c</sup>

### IV.

902. *The Wife who has obtained a Separation of Goods cannot alienate them.*—The separation of goods gives the wife only a right to enjoy her own goods, and to take care of them; but she cannot alienate them,<sup>d</sup> except in so far as the laws and customs of the country may allow her.<sup>e</sup>

### V.

903. *She may distrain the Goods of the Husband, and cause them to be sold for her Dowry.*—If the dowry consists in money, debts, or other effects which are not in being, the wife may, by virtue of the separation, distrain and cause to be exposed to sale the goods of the husband, and others that are mortgaged to her, even although they be in the hands of a third possessor.<sup>f</sup>

<sup>b</sup> L. 24, D. solut. matr.; — v. l. 22, § 8, eod.; — l. 30, in f. C. de jure dot.

<sup>c</sup> L. 29, C. de jure dot.

<sup>d</sup> L. 29, C. de jur. dot.

<sup>e</sup> See the thirteenth and fifteenth articles of the first section.

<sup>f</sup> L. 29, C. de jur. dot.

## VI

904. *She may do the same for the Recovery of her Paraphernal Goods which she gave her Husband.* — If, besides the goods of the dowry, the wife had put into her husband's custody her paraphernal goods which are not in being, she may recover them in the same manner as the goods of her dowry.<sup>s</sup>

## VII.

905. *As also for her Gains.* — If by the contract of marriage there are gains due to the wife out of the husband's estate, she may recover them in the same manner as she recovers her dowry, whether it be to preserve her right of property in them, if she is not to have the enjoyment of them till after the husband's death, or that she may enter on the actual enjoyment of them; according as the quality of the said gains shall happen to be regulated, either by the contract of marriage, or by the customs and usage of the places.<sup>h</sup>

## TITLE X.

## OF DONATIONS THAT HAVE THEIR EFFECT IN THE LIFETIME OF THE DONOR.

906. *Two Sorts of Donations.* — *Differences between Donations that take Effect in the Lifetime of the Donor, and those which do not take Effect till after his Death.* — There are two sorts of gifts, or donations. One, which takes effect during the life of the donor. And the other sort is of such donations as are made in prospect of death, and which have their effect only after the death of the donor. There are two essential differences between these two sorts of donations. One is, that the donations which take effect during the life of the donor are covenants transacted between the donors and the donees, which makes them irrevocable; whereas donations made in prospect of death are dispositions of the same nature with legacies, and the institution of an executor, which depend on the bare will of those who give, and which for that reason

<sup>s</sup> D. l. 29, C. de jur. dot.<sup>h</sup> D. l. 29, C. de jur. dot.; — Nov. 97, cap. 6.

may be revoked. The other difference between donations that take effect in the lifetime of the donor, and those which have their effect only after his death, is a consequence of the former, and consists in this, that he who gives during his lifetime divests himself of that which he gives away, and transfers it to the donee, who becomes master of it; whereas he who gives only in prospect of death loves rather to keep than give away, and remains until his death proprietor of what he gives, having a right to deprive the donee of it, and to dispose of it otherwise as he pleases. Thus, whereas the donation that takes effect in the lifetime of the donor strips the donor himself, the donation made in prospect of death strips only his heir or executor.\*

907. It is because of this last difference between the donations that take effect in the donor's lifetime, and those which take effect only after his death, that the customs which do not permit testamentary dispositions to the prejudice of the next heirs, except as to a certain portion of the goods, reduce to the same portion donations made in prospect of death; and that, on the contrary, they permit donations that have their effect in the donor's lifetime to the prejudice of the heirs, because the donor not only strips his heirs, but also himself, of what he gives away. And these sorts of donations which strip the donor have no other bounds than those which have been set to them by the several customs of particular places; whether it be for preserving to the children their filial portions, or for restraining largesses between certain persons, or for other causes.

908. It follows from this nature of donations that take effect in the donor's lifetime, that, they being covenants irrevocable which strip the donor of what he gives away, every donation that has not this character, and which leaves the donor at liberty to revoke it, is a donation of no force; that is to say, it is not, properly speaking, a donation that is to take place in the lifetime of the donor.

909. It is on this principle that the common rule in this matter depends, viz. *that to give and to retain avails nothing*. The meaning of which is, that if the donor keeps what he gives away, he does not divest himself, and does not give. Which maxim has this extent, that it annuls not only the donations in which the donors reserve a liberty of disposing of the things given, but likewise

\* L. 35, § 2, *D. de mort. caus. donat.*

all those donations in which there happen to be circumstances denoting that the donor has not divested himself; and that the donee has not been made irrevocably master of the thing that was given him. Thus a donation, whereof the deed or title remains in the custody of the donor, the donee having no duplicate of it, or of which the minute or draught is not put into the hands of a public notary, in order to draw up the instrument, would be a void donation; because the donor would retain the liberty of annulling it.

910. Donations made in prospect of death are one of the matters treated of in the second part of this work; and the present title relates only to donations that have their effect in the lifetime of the donors, because they are covenants. But to avoid the repeating always the expression at large of donations that take effect in the lifetime of the donors, we shall use only the simple word of donations.

911. Donations are liberalities which are natural in the order of society, where the ties of parentage and friendship, and the several engagements, lay different obligations on persons to do good, either out of gratitude for favors received, or out of an esteem of merit, or out of a motive of assisting those that are in want, or upon other considerations.

912. There are divers sorts of ways of giving, and doing of good, as well as of commerce. And as we make a commerce of industry, labor, services, and also of things, we do the same likewise of gratuitous deeds; but we give the name of donation only to that kind of liberality by which we strip ourselves of the things; and not to the services and good offices which we render to those whom we are willing to oblige.<sup>b</sup>

913. *Of Donations between Man and Wife.* — We shall not insert under this title any of the rules of the Roman law which concern donations between man and wife; because this matter is so differently regulated in the provinces which are governed by the Roman law, and by the customs, that it would be to deviate too far from the design of this work to set down here rules of which there is scarcely one that is universally received everywhere. But to supply this want, we have thought proper to observe here the general principles which are the foundation of the different laws concerning donations between man and wife, to show in the

<sup>b</sup> L. 19, § 1, *D. de donat.*

said principles the spirit of the different rules which are observed, either in the provinces that are governed by the Roman law, or in the customs. And they are contained in the following remarks.

914. The strict union between man and wife being an occasion to them to exercise their liberality towards one another, according to their affection and their estates; the use of these sorts of donations was attended with so great inconveniences, that it was abolished by the Roman law. For it appeared from experience, that the easy temper either of the husband or of the wife impoverished the one to enrich the other; that the application of the party that was most covetous to procure largesses from the other, engaged them in cares and views entirely opposite to their duty of educating their children, or diverted them wholly from any thoughts of it; that the one party refusing to comply with the desires of the other, in giving what was asked, it was an occasion of strife and contention; and, in fine, the Roman lawgivers were of opinion, that the conjugal love ought to subsist and to be nourished by a more honorable motive than that of self-interest.<sup>c</sup>

915. But seeing the principal consideration which induced the Roman lawgivers to annul donations between man and wife was to prevent their impoverishing one another in their lifetime, and that the donor might not be destitute of all manner of substance after the dissolution of the marriage, whether it were by death or divorce, the donations which were to take effect only after the death of the donor, not producing the same ill consequences, were permitted between man and wife. And they gave likewise this effect to donations which were intended to take place in the lifetime of the donor, that, if they were not revoked by the donor in his lifetime, they should be confirmed by his death, and be as valid as if they had at first been made in prospect of death.

916. The dispositions of the customs in relation to donations between man and wife are different, according to the regard which they have had to the motives upon which these donations were annulled by the Roman law, or according to the other views of the spirit and principles of the said customs. Thus some of them have allowed donations between man and wife of the property of movables, and of the immovables of their own acquisition; and likewise of a part of the estate which came to them by inheritance.

<sup>c</sup> *Ll. 1. 2. et 3, D. de donat. inter vir. et uxor.*



but they would have these donations to be revocable. Thus the same customs, and many others, have approved of donations between man and wife that take effect in the lifetime of the donor, and allow them to be irrevocable, provided they be only of an enjoyment of the movables and immovables of the donor's own purchase, and that they be reciprocal. And the disposition of these customs is founded on this principle, that the liberality being reciprocal, and both the one and the other party being uncertain of the event which would entitle the longest liver to the benefit of the gift, these kinds of donations are not attended with the same inconveniences as where the condition of both parties is not equal, and that they have nothing in them which may disturb the peace and tranquillity of the state of matrimony, or which is contrary to the honor of marriage.

917. But other customs, under other views, have forbid all dispositions made by the wife in favor of her husband, even although they were made in prospect of death; notwithstanding the same customs allow the husband to give to his wife all his estate by a donation that is to take place in his lifetime, reserving only to the children their filial portions. And these customs regulate the matter thus, because they make the wife's condition less advantageous in other respects, the community of goods not being there received; and because they will secure the wife's estate against the dispositions to which the husband's power and authority over her might engage her.

## SECTION I.

OF THE NATURE OF DONATIONS THAT TAKE EFFECT IN THE LIFETIME OF THE DONOR.

### ART. I.

918. *Definition of Donation.*—A donation which takes effect during the life of the donor is a contract made by a reciprocal consent between the donor, who strips himself of the thing which he gives away, in order to transfer it gratis to the donee, and the donee, who accepts and acquires the thing that is given him.

<sup>1</sup> § 2, *Inst. de donat.*; — l. 1, *D. de donat.*; — v. l. 22, in *f. eod. in verbo Contractibus*; — l. 7, *C. de his que vi mature, c. g. a.*

## \*II.

919. *No Donation without Acceptance.*—There is no donation without acceptance. For if the donee does not accept, the donor is not divested of the thing which he gives, and his right remains still with him.<sup>b</sup>

## III.

920. *If the Donee is incapable of accepting.*—If the donee is incapable of accepting, as if it be a child which cannot speak, nor express any desire of having the thing given, the acceptance must be made by a person that is capable of accepting for him, such as his father, his tutor, or guardian.<sup>c</sup>

## IV.

921. *Who gives what he is bound to give does not make a Donation.*—A donation is a liberality, and he who gives only what he owes, or what he is obliged to give, does not make a donation, but acquits himself of a debt, or of some other engagement. Thus, he who gives in order to fulfil a condition in a testament, or of a donation which burdens him with it, is not a donor, even although it were out of his own substance that he had been charged to give.<sup>d</sup>

## V.

922. *Remuneratory Donations.*—The donations which are called remuneratory, and which are made in recompense of services, are not properly donations, except when that which is given could not be demanded by the donee; and the recompense which the donee could demand is not in effect a donation.<sup>e</sup>

## VI.

923. *Donations are irrevocable.*—Although a donation be a liberality, yet it is irrevocable, as other covenants are;<sup>f</sup> unless it be with the consent of the donee, or for some one of the causes which shall be explained in the fourth section.

<sup>b</sup> L. 19, § 2, *D. de donat.*;—l. 69, *D. de reg. jur.*;—l. 156, § ult. *cod.*;—l. 10, *D. de don.*;—l. ult. *C. de revoc. donat.*

<sup>c</sup> L. 26, *C. de donat.*

<sup>d</sup> L. 35, § 1, *D. de mort. caus. donat.*;—l. 82, *D. de reg. jur.*;—l. 29, *D. de donat.*;—l. 1, *cod.*;—l. 8, *D. de don.*

<sup>e</sup> L. 27, *D. de donat.*;—v. l. 34, § 1, *cod.*;—l. 82, *D. de reg. jur.*

<sup>f</sup> § 2, *Inst. de donat.*;—l. 1, *D. de don.*;—l. 35, § ult. *C. de don.*

## VII.

924. *What Things may be given.* — We may give all things that are in commerce, and which we have power to dispose of, movables, immovables, debts, rights, actions, and even goods to come, and in general every thing that may pass from one person to another, and be acquired by him. And it is also donation when the creditor forgives the debt to his debtor.

## VIII.

925. *Donation of all the Donor's Goods, or of a Part of them.* — One may give away either all his goods, or a part of them, provided the donation be not undutiful;<sup>1</sup> and that if it is of all one's goods, there be reserved either the usufruct of the goods given, or some other thing which may suffice for the sustenance of the donor. For it would be contrary to good manners, for the donee to strip the donor of his whole substance, both in principal and revenue.<sup>1</sup>

## IX.

926. *The Fruits reaped after the Donation do not augment it.* — The fruits and revenues which the donee gathers from the things given after the donation are no part of the gift, neither do they augment it; but they are goods belonging to the donee, in the same manner as the fruits of a thing which is his own. Thus, in donations that are subject to some reduction, we do not reckon the fruits that have been reaped after the donation. Thus, when a donation comes to be annulled by the existence of some condition, or otherwise, the donee does not restore the fruits and revenues which he has reaped.<sup>m</sup>

## X.

927. *Donations either Pure and Simple, or Conditional.* — Donations are either pure and simple, or made upon some condition, or with some charge. And the donee is obliged to acquit the

<sup>1</sup> L. 9, § ult. *D. de donat.*; — l. 3, *C. cod.*; — l. 115, *D. de reg. jur.*; — l. 18, *C. de donat.*

<sup>h</sup> L. 35, § 4, *C. de donat.*

<sup>1</sup> Undutiful donations are those which are taken out of the legitime or legal portions of those persons to whom such portions are due by law; and this is a matter which belongs to the second part.

<sup>1</sup> L. 28, *D. de reg. jur.*; — l. 12, *D. de don.*

<sup>m</sup> L. 9, § 1, *D. de don.*; — l. 11, *cod.*

charges, and perform the conditions which the donor has enjoined him.<sup>a</sup>

## XI.

928. *Three Sorts of Conditions.* — The conditions in donations, as in other covenants, are of three sorts. Some are such, that the validity of the donation depends on the existence of the condition; others make void the donation which had subsisted; and others make only some change, without annulling the donation.<sup>b</sup> Thus, donations made in favor of marriage imply the condition, that they shall not have their effect till the marriage be accomplished.<sup>c</sup> Thus, a donation being made upon condition that, if the donee dies before the donor, the things given shall return to the donor, this condition annuls a donation which had subsisted.<sup>d</sup> And this other condition, that after a certain time, or in a certain case, the donee shall be bound to deliver the things given, or a part of them, to another person, neither annuls nor accomplishes the donation; but makes the change in it which has been agreed on, and obliges the donee to deliver the things to the person to whom the restitution ought to be made.<sup>e</sup>

## XII.

929. *When the Donation is perfected, it admits of no new Burdens.* — After the donation has been accomplished, it is no longer in the power of the donor to impose on the donee any new condition or charge, even although he were father to the donee.<sup>f</sup>

## XIII.

930. *Difference between Motives and Conditions of Donations.* — We are to make a great difference in donations between the motives which the donors express as the causes of their liberality, and the conditions with which they burden them. For whereas the default of a condition annuls the conditional donation; yet it subsists, although the motives expressed in it prove not to be true. Thus, if it is said in a donation, that it is made on account of

<sup>a</sup> L. 9, C. de donat.

<sup>b</sup> See the fourth section of *Covenants*.

<sup>c</sup> See the last article of the first section of the title of *Dowries*.

<sup>d</sup> L. 2, C. de donat. quæ sub modo.

<sup>e</sup> L. 3, C. de donat. quæ sub modo.

<sup>f</sup> L. 4, C. de donat. quæ sub modo.

services done, or to facilitate to the donee the making of a purchase which he had a mind to, the donation will not be annulled, although no services have been rendered, nor the purchase made. For there remains still the absolute will of the donor, who may have had other motives besides those which he has expressed. But if it was said, that the donation is made only on condition, that what is given be laid out on such a purchase, such as the buying of an office, and the office is not bought, the donation will have no effect.<sup>t</sup>

## XIV.

931. *Reservation of the Usufruct.*— In all donations, whether they be universal of all one's estate, or particular of certain things, the donor may reserve to himself the use and profits of the things which he gives.<sup>u</sup>

## XV.

932. *Registering of Donations.*— Donations ought to be registered, that every body may know the engagement, which being unknown might give occasion to many frauds.<sup>x</sup>

## XVI.

933. *Alimony afforded out of Liberality, or otherwise.*— We may place in the number of donations the expenses which one person is at for another out of a motive of liberality, and without hopes of recovering them; as if one is at the charges of maintaining a near relation; and what has been given in this manner cannot be afterwards redemanded. But it is by the circumstances that we are to judge whether it was the intention of the party to give, or not.<sup>y</sup>

<sup>t</sup> L. 2, § ult. *D. de donat.*; — l. 3, *D. cod.*

<sup>u</sup> L. 28, *C. de don.*; — l. 35, § 5, *cod.*

<sup>x</sup> L. 27, *C. de donat.*; — l. 30, *et seq. cod.*; — r. l. 17, § 1, *D. quæ in fraud. credit.* We take notice here only of the general rule of registering donations; and leave out the whole detail of this matter as it is regulated by the ordinances, and by our usage, otherwise than it is in the Roman law. See the ordinance of 1539, art. 132, and that of *Moulins*, art. 58.

<sup>y</sup> L. 27, § 1, *D. de neg. gest.*; — l. 15, *C. de neg. gest.*

## SECTION II.

## OF THE ENGAGEMENTS OF THE DONOR.

## ART. I.

934. *First Engagement of the Donor, not to revoke.* — The first engagement of the donor is, that he cannot annul the donation, when he has once given his consent to it; and he cannot revoke it,<sup>a</sup> except for just reasons; such as if he was forced to make it, if he was incapable of contracting, or if he was in one of the cases which shall be explained in the third section.

## II.

935. *Second Engagement, the Delivery.* — The second engagement of the donor, and which is a consequence of the first, is to perform the donation, and to deliver the thing given, and he may be constrained to it by the donee, or by his heirs, executors, or administrators.<sup>b</sup>

## III.

936. *Reservation of the Use and Profits is in Lieu of Delivery.* — When there is a reservation of the use and profits in a donation, that serves instead of a delivery.<sup>c</sup>

## IV.

937. *Third Engagement, Warranty.* — It is likewise a third engagement of the donor, that, if he is obliged for the warranty of the things given, he ought to warrant them. But if he has not engaged himself for the warranty, and it happens that he has given what was not his own, believing honestly that he was the right owner of it, he is discharged from the warranty. For it is presumed that he meant only to exercise his liberality in things that were his own.<sup>d</sup>

## V.

938. *If the Knavery of the Donor occasions any Loss to the Donee.* — If the donor was guilty of any knavish dealing, as if he gave a

<sup>a</sup> L. 5, C. de revoc. don.; — l. 3, l. 6, eod. — See the sixth article of the first section.

<sup>b</sup> § 2, Inst. de donat.; — l. 35, C. eod.

<sup>c</sup> L. 28, C. de donat.; — l. 35, § 5, eod. See the seventh article of the second section of the Contract of Sale.

<sup>d</sup> L. 2, C. de evict.; — l. 18, § ult. D. de donat. See the following article.

thing which he knew was not his own, he would be bound to make good the losses and damages which the donee may chance to sustain through his knavery.\*

## VI.

939. *The Donor cannot be constrained to more than what he is able to give without being reduced to Want.* — The donor cannot be obliged to perform what he has promised, but in so far as he is able, without being reduced to want. For it would be unjust that his liberality should be an occasion of inhumanity to his donee.†

## VII.

940. *Interest of the Things given.* — The donor owes no interest for the things given, even after the delay, unless they are expressly stipulated, or unless there has been a condemnation in a court of justice. And they will not be due but from the time they have been demanded, and according as the circumstances may require; as if a sum of money has been given for a marriage portion.‡

## SECTION III.

OF THE ENGAGEMENTS OF THE DONEE, AND OF THE REVOKING OF DONATIONS.

### ART. I.

941. *First Engagement of the Donee, to acquit the Charges.* — The first engagement of the donee is to satisfy the charges and conditions of the donation, when there are any; and if he fails in it, the donation may be revoked, according to the circumstances.\*

### II.

942. *Second Engagement, Gratitude.* — The second engagement of the donee is thankfulness for the benefit received; and if he is

\* L. 18, § 1. D. de donat.

† L. 12, D. de donat.; — l. 28, D. de reg. jur.; — l. 173, D. de reg. jur.; — l. 49, D. de re jud.

‡ L. 22, D. de donat.; — l. 7, D. de jur. dot.

§ L. 9, C. de donat.; — l. ult. C. de revoc. donat.

ungrateful to the donor, the donation may be revoked according as the deed of the donee may have given occasion for it. Thus, the donor may revoke the donation, not only if the donee makes any attempt upon his life or honor, but likewise if he commits any violence or outrage upon his person, or does him any injury; or if he occasions him any considerable loss by unfair practices.<sup>b</sup>

### III.

943. *Ingratitude dissembled by the Donor.* — The right of revoking a donation because of the ingratitude of the donee does not pass to the heir, executor, or administrator of the donor, if he himself, having known the ingratitude, did not resent it.<sup>c</sup>

### IV.

944. *Revocation of the Donation, because of Children being afterwards born to the Donor.* — If, after a donation made by a person who had no children, he happens to have children born to him, the donation will be void, upon presumption that he who gave having no children would not have given if he had had any, and that he gave only upon this condition, that, if he should happen to have children, the donation should be of no force.<sup>d</sup>

<sup>b</sup> *L. ult. C. de revoc. don.; — l. 9, cod.* Although the causes of ingratitude, which may suffice for revoking a donation, be restrained by this last law of the code, *de revoc. don.*, to these which are expressed in this article, yet we put them down only as an example. For there may be other causes which may deserve that a donation should be revoked; as, for instance, if the donee should refuse alimony to his donor when he is reduced to great straits.

<sup>c</sup> *L. ult. G. de revoc. donat.; — l. 1, in f. cod.*

<sup>d</sup> *L. 8, C. de revoc. don.; — v. l. 6, § 1, C. de inst. et subst.; — l. 102, D. de cond. et dem.; — l. 40, § ult. D. de pact.* Although this law be only in favor of the patron who had made a donation to one whom he had set free from slavery, yet we observe it indifferently for all persons. But if the donation was small, and made by a person who had a plentiful estate, to a donee that was in poor circumstances, and for favorable causes, would such a donation be revoked by the birth of a child?

If this child happens to die before the donor has revoked the donation, ought it to subsist, the cause of the revocation having ceased by the child's death? or is it annulled in such a manner by the child's birth, that its death cannot make it revive? These words of the law, *revertatur in ejusdem donatoris arbitrio ac ditione mansurum*, seem to signify that the donation is annulled, and that the donor takes back irrevocably what he had given. Which may be confirmed by the sixth law, § 1, *de inst. et subst.*, where it is said, that if a father burdens his son who had no children with a substitution, the said substitution will vanish whenever the son comes to have children, *evanesce substitutionem*. To which we may add, that the child which is born to the donor after the donation, being seized by its birth of a right to succeed to its father, this right annuls the donation, and



## TITLE XI.

## OF USUFRUCT.

945. *Reasons for treating of Usufruct in this Place.*—In the foregoing title mention has been made of the reservations of usufruct which are made in donations; and the like reservations may also be made in marriage settlements, in sales, exchanges, transactions, and other covenants.<sup>a</sup> We may likewise by express covenants settle on any person the usufruct of a thing without the property.<sup>b</sup> So that seeing usufruct may be settled by contracts, it is a kind of covenant. And although it be likewise acquired by testaments, and other dispositions made in prospect of death, or even by the laws, such as the usufruct which the laws, the ordinances, and the customs give to parents in the estates of their children, whether it be under the name of usufruct or wardship; yet we choose to place this matter here, which, since it can only be in one place, ought to be put in the first where there is occasion to speak of it, as has been remarked in the plan of matters.

\* 946. The practice of settling the usufruct of a thing without the property is natural in society, not only because of the indefinite liberty of all sorts of covenants, but also because of the usefulness of separating on many occasions the right of property from that of the present enjoyment. And this separation which is made naturally by the commerce of letting to hire and to farm, is likewise made very justly upon other views; whether it be in donations, where the benefactor is willing only to divest himself of the property of his estate, reserving still the present enjoyment; or whether it be in the commerce of contracts, as if, two persons making an exchange, each reserves to himself the present enjoyment of the land or tenement which he gives away; or in testaments, as when a testator devises the use and profits of lands or tenements, leaving the property of them to his executor, or if he devises the property, and leaves the use and profits either to the

which being once annulled, there does not remain to the donee so much as a right to keep the donation in suspense under pretext that the child may come to die before its father. For it is unlawful to hope for an event of this nature. *Nec enim fas est hujusmodi casus expectare.* L. 34, § 2, *D. de contr. empt.*

<sup>a</sup> L. 28, *C. de donat.*

<sup>b</sup> L. 3, *D. de usufruct.*; — § 1, *Inst. cod.*; — l. 4, *C. cod.*

usufructuary, or to the executor, or to another legatee.\* In all these cases, whether it be that the usufruct be settled by covenant, by testament, by a law, or by custom, the nature of it is still the same, unless the title by which the usufruct is settled makes some distinction; and it is this matter of usufruct in general which is the subject-matter of this title.

947. We may likewise consider as a kind of usufruct, to which several rules of this title may be applied, the right which the incumbents of church benefices have to enjoy the revenues belonging to them. And this kind of usufruct has this peculiar property belonging to it, that the estates which are subject to it do not belong to any particular owner, but to the church.

948. Those who have read this matter of usufruct in the Roman law may be apt to find fault that we have omitted to set down under this title the rule which is to be met with in the eighth law, *D. de usufr. et usu leg.*, and in the fifty-sixth law, *D. de usufr.* Which laws say, that if the usufruct of a thing be given to a town, or other corporation, it lasts a hundred years. But besides that the case of such a usufruct is so very singular and odd, that it does not deserve a rule;<sup>a</sup> if one were necessary, it would not seem just to make the proprietor lose, by a usufruct, the enjoyment of his estate for three or four generations; and it would be much more reasonable to limit it to thirty years. For which opinion we have the authority of another law.\*

## SECTION I.

### OF THE NATURE OF USUFRUCT, AND OF THE RIGHTS OF THE USUFRUCTUARY.

#### ART. 1.

949. *Definition of Usufruct.*—Usufruct is a right to use and enjoy a thing which is not our own, preserving it whole and entire, without spoiling or diminishing it.\*

\* § 1, *Inst. de usufr.*

\* See the twenty-first article of the first section of the rules of law.

\* *F. l. 68, in f. D. ad leg. Falc.*

\* *Usufructus est jus alienis rebus utendi, fruendi, salva rerum substantiâ. L. 1, D. de usufr.;—Inst. eod.* See on these last words, *without spoiling or diminishing it*, that which shall be said in the third section

## II.

950. *Usufruct of Movables and Immovables.*—We may have the usufruct not only of things immovable, but also of movable; such as a suit of hangings, a herd of cattle, and of other movable things,<sup>b</sup> according to the rules which shall be explained in the third section.

## III.

951. *Usufruct comprehends all Sorts of Revenues.*—The usufruct consists in the full and entire enjoyment of all the kinds of fruits, revenues, conveniences, and uses which may be reaped from the thing of which one has the usufruct. Such are the fruits of trees, the cuttings of coppice-wood, the young trees which may be taken out of a nursery without spoiling it, all crops, the honey of bees; and in general the usufructuary enjoys and uses every thing without reserve. And we may likewise have the usufruct of movables and immovables, from which we reap no other use besides that of bare recreation.<sup>c</sup>

## IV.

952. *The Usufructuary makes the Fruits which he gathers his own.*—The usufructuary who at the moment that he acquires his right, and that it begins to take place, finds fruits hanging on the trees, or unseparated from the ground, which are ripe, may gather them, and they are his own. And if the usufruct happens to be extinct, either by the death of the usufructuary, or otherwise, in the time of harvest, the portion of the fruits which the usufructuary gathered before his death, although still remaining on the estate, yet being separated from the ground, will belong to his heirs, executors, or administrators. And what remains ungathered will belong to the proprietor, as also the fruits which fell of themselves, and to which the usufructuary had not put his hand. For seeing he has only a right to enjoy, if this right expires before the enjoyment, he has nothing further to pretend. So that when the usufructuary dies before harvest, his heirs, executors, or administrators will have no share in the fruits.<sup>d</sup>

<sup>b</sup> L. 3, § 1, *D. de usufr.*; — l. 7, *cod.*; — § 2, *Inst. cod.* See the third section.

<sup>c</sup> L. 7, *D. de usufr.*; — d. l. § 1; — l. 9, *cod.*; — l. 59, § 1, *cod.*; — l. 9, § 6, *cod.*; — d. l. § ult.; — l. 28, *D. cod.*; — l. 41, *cod.*

<sup>d</sup> L. 27, *D. de usufr.*; — l. 13, *D. quib. mod. usufr. vel us. am.*; — l. 8, *in fine*, *D. de ann. legat.* It is to be remarked on this article, that as a usufruct may be acquired by differ-

## V.

953. *The Rent of the Lease belongs to the Usufructuary, as the Fruits do.*—If the fruits of lands which are subject to a usufruct were let to farm, the usufructuary who has actually acquired his right at the time of the harvest shall receive of the farmer the rent of the farm, in the same manner as he would have gathered the fruits, in case there had been no lease. And although the usufruct come to be extinct between harvest-time and the term of payment, yet the usufructuary, or his heirs, executors, or administrators, will receive the whole rent of the lease, for that crop.\*

## VI.

954. *The Revenues which are acquired successively are shared between the Proprietor and the Usufructuary, in Proportion to the Time.*—The revenues which are acquired successively, and from moment to moment, such as the rents of a house, belong to the usufructuary in proportion to the time that his right lasts. Thus, when a usufruct commences from the first of January, and ceases before the end of the year, the proprietor shall have the rents which accrue after the usufruct is extinct, and the usufructuary, or his heirs, executors, or administrators, shall have the rents for the time that the usufruct lasted.†

## VII.

955. *In what Manner the Usufructuary may anticipate the Harvest.*—The usufructuary may gather, before a perfect maturity,

ent titles; such as a testament, a contract, a law, as has been taken notice of in the preamble to this title; so we ought to follow in each kind of usufruct, as to what concerns the rights of the usufructuary, whatever has been regulated in that matter by the title, although it be different from the rule explained in this article. Thus, the enjoyment which the incumbents of church benefices have of the fruits belonging to them is a kind of usufruct which is regulated in another manner. For since the fruits of the benefice belong to the incumbent on account of the charges and burdens, the fruits of the last year, reckoning the year to commence, as is the rule, from the first of January, are shared between the executors or administrators of the late incumbent and his successor in the benefice, in proportion to the time that the late incumbent lived the last year. Thus the fruits of the dowry, after the dissolution of the marriage, are shared differently between the survivor and the heirs or executors of the deceased, according to the different customs of places, as has been remarked in the preamble to the title of *Dowries*. Thus the usufruct of fathers, and wardships, are regulated according to the provisions made in such cases by the respective customs and usages of places.

\* L. 58, D. de usufr.

† L. 26, D. de usufr.

the fruits whose nature is such that it is either customary, or more profitable, to gather them before they are fully ripe. Thus we do not wait for the full maturity of olives, hay, or of a copse. But the usufructuary ought to tarry till the time of full maturity for harvest, and for the vintage.<sup>a</sup>

### VIII.

956. *Augmentation or Diminution of the Usufruct, by the Change happening to the Estate.*—The usufruct increases or diminishes in proportion to the augmentation or diminution which may happen to the estate that is subject to the usufruct. And as the usufructuary bears the loss or diminution of his usufruct if the estate perishes, or is damaged by an inundation, by fire, or other accident,<sup>b</sup> so likewise he reaps the advantage of the changes which make the estate better or larger. As if the event of a lawsuit acquires to the estate a service, or a greater extent of ground; or if the neighbourhood of a river brings to it some addition.<sup>c</sup>

### IX.

957. *Changes which the Usufructuary may make in the Estate, for raising the Revenue.*—The usufructuary may open a quarry in the ground of which he has the usufruct. For the stones which he digs out of it are instead of fruits; and it is the same thing with respect to the other matters which he shall get out of the said ground. And he may likewise pluck up by the roots a plantation, as of vines, for instance, to make some such change in it, provided that the estate be improved, and the revenue increased by it. For the usufructuary may make improvements, but he cannot make any change to the detriment of the proprietor's right. But although the revenue were augmented by a change of the condition of the estate, if this improvement were only for a time, or if this change should occasion otherwise some inconveniences or expenses, which might prove chargeable to the proprietor, the usufructuary would be bound to indemnify him, he having exceeded the bounds of his right.<sup>d</sup> Thus, it is by the circumstances that we ought to judge of the changes which the usufructuary may or may not make.

<sup>a</sup> L. 48, § 1, *D. de usufr.*; — l. pen. *D. de us. et usufr. leg.*

<sup>b</sup> See the fourth, fifth, and sixth articles of the sixth section.

<sup>c</sup> L. 9, § 4, *D. de usufr.*

<sup>d</sup> L. 13, § 5, *D. de usufr.*; d. l. 13, § 6.

## X.

958. *Trees blown down.* — The trees blown down by the wind, or by some other accident, belong to the proprietor of the ground of which they were a part. So that he is obliged to carry them away at his own charges, that they may no ways incommode. And the usufructuary receiving no benefit by them, he is not obliged to plant new ones in their stead.<sup>m</sup>

## XI.

959. *Dead Trees.* — The dead trees belong to the usufructuary as a kind of revenue, but with the charge of planting new ones in their room.<sup>n</sup>

## XII.

960. *Trees blown down may be employed in Repairs.* — If the places subject to a usufruct happen to stand in need of some repair, to which the trees that are blown down by some accident may be serviceable, the usufructuary may make use of them for that purpose.<sup>o</sup>

## XIII.

961. *Vine Props.* — The usufructuary may take trees out of a wood, for making props for the vines, provided he does not do any damage to the wood.<sup>p</sup>

## XIV.

962. *Service accessory to the Usufruct.* — If the usufructuary of a piece of ground cannot have access to it but through another ground belonging to the person who created the usufruct, this passage will be due to the usufructuary. Thus, if a testator has bequeathed the usufruct of a piece of ground, to which one cannot enter but through another ground of his succession, and this other ground remains with the executor, or is devised to another legatee, the executor or the legatee holding this ground of the testator will be obliged to suffer the service of the passage;<sup>q</sup> and

<sup>m</sup> L. 19, § 1, *D. de usufr.*; — l. 59, *cod.* See the following article.

<sup>n</sup> L. 18, *D. de usufr.*

<sup>o</sup> L. 12, *D. de usufr.*

<sup>p</sup> L. 10, *D. de usufr.*

<sup>q</sup> L. 1, § 1, *D. si usufr. pet.*; — d. l. 1, § 2; — l. 15, § 1, *D. de usu et usufr. leg.*

to give it such as shall be found necessary for cultivating and enjoying the ground that is subject to the said usufruct.

## XV.

963. *Conveniences which are not necessary to the Usufructuary.* — If, in the case of a usufruct bequeathed, the usufructuary wants some conveniences which are not absolutely necessary for the enjoyment, such as that of a passage, he cannot pretend that the executor should furnish him such sorts of conveniences. Thus, he cannot demand that they should give him more convenient lights for a chamber, a more easy passage, or a liberty to draw water out of a well. For the usufruct is limited to the enjoyment of the thing, such as it is at the time that the usufructuary acquires his right.<sup>a</sup>

## XVI.

964. *The Usufructuary has the Services.* — The usufructuary may in his own name sue for the right of a service, if any is due to the estate of which he has the use and profits, and may sue the neighbour who owes it, in the same manner as the proprietor himself might do.<sup>b</sup>

## XVII.

965. *The Improvements and Repairs which the Usufructuary may make.* — The usufructuary may make, in the estate of which he has the usufruct, improvements and repairs, useful or necessary, and even for his bare pleasure; provided he does not make the estate the worse, nor change the condition of the places. Thus, he cannot raise a building higher, nor change the apartments or other dependencies of a house, nor disfigure them, augment, or diminish them, not even by adding what would be better, or demolishing what is useless. But he may, for instance, make new lights, paint the rooms, and embellish the house with statues and other ornaments.<sup>c</sup>

## XVIII.

966. *He cannot take away the Improvements or Repairs which he has made.* — If the usufructuary has made improvements, or

<sup>a</sup> D. l. 1, § 3, D. si usufr. pet.

<sup>b</sup> L. 1, § ult. D. si usufr. pet.

<sup>c</sup> L. 1, D. si usufr. pet.

<sup>d</sup> L. 7, in f. et l. 8, D. de usufr.; — l. 13, § 7, eod.; — v. § 8, eod.

repairs, whether useful or necessary, or for his pleasure, he can demolish nothing of what he has built, nor take away any thing but what may be preserved after it is taken away.\*

## XIX.

967. *The Usufructuary may transfer, sell, and give away his Right.* — The usufructuary may either enjoy the thing of which he has the usufruct himself, or he may let out his right to another; he may likewise transfer, sell, or give away his usufruct. And the disposition which he makes of it is to him instead of an enjoyment of it, and preserves his right.

## XX.

968. *He may interrupt the Lease.* — The usufructuary has the liberty of interrupting the lease which the proprietor had made, in the same manner as the buyer has;† unless it be otherwise regulated by his title. For having the right of enjoying the whole revenue, and commonly during his life, he is as it were master, and is not obliged to let the farmer enjoy a profit which belongs to him.

## SECTION II.

## OF USE AND HABITATION.

969. *Difference between Use and Usufruct.* — Use is distinguished from usufruct by this, that whereas usufruct is a right to enjoy all the fruits and revenues which the estate that is subject to it is capable of producing, use consists only in a right to take out of the fruits of the ground such portion of them as may be consumed by use, and which is necessary for the person who has the use, or which is settled by his title; and the surplus belongs to the proprietor of the estate. Thus, those who have the right of use in a forest, or a coppice, can only take out of it what is necessary for their use, or regulated by their title. And he who has the use of any other ground can only take out of it what may

\* L. 15, D. de usufr. See the last article of the third section of the title of *Dowries*.

† L. 12, § 2, D. de usufr.; — l. 67, *cod*.

\* L. 59, § 1, D. de usufr. See the fourth article of the third section of *Letting and Hiring*.



be necessary to supply the occasions he shall have of those kinds of fruits which the said ground produces; or the use may be even restrained to certain kinds of fruits or revenues, without extending it to others. Thus we see in the Roman law, that he who had only the simple use of a piece of ground had no share of the corn or oil that grew in it;<sup>a</sup> and that he who had the use of a flock of sheep was restrained only to make use of them for dunging his ground, and had no share either in the wool or lambs; and even for the milk, it is said in some places that he could take only a very small portion of it; and in other places it is said he had no right to any of it.<sup>b</sup>

970. *Of Habitation.* — Habitation is in houses what use is in lands; and whereas he who has the usufruct of a house may enjoy the whole house, he who has only a right of habitation has his enjoyment of it limited to what part is necessary for him, or settled by his title. As to which it is necessary to observe, that although the word *habitation* appears to be restrained in some laws to the sense explained in this definition;<sup>c</sup> yet it seems in others that habitation, as also the use of a house, implies the enjoyment of the whole house. So that it is not so much by the sense of these words *habitation* and *use*, that we are to extend or limit the enjoyment of those persons who have these sorts of rights, as by the terms of the title by which it is conveyed, which may help us to judge of the intention, either of the testator, if this right is acquired by testament, or of the parties contracting, if it is by contract that it is settled.<sup>d</sup>

#### ART. I.

971. *Definition of Use.* — Use is a right to take out of the fruits subject to it so much as he who has the use may consume on his wants, or so much as is given him by his title.<sup>e</sup> And this is regulated either by the title itself, if it has expressed the quantity, or by the prudence of the judge, according to the quality of him who has the use, and the intention of the persons who have settled this right, or by the customs and usage of the places, if they have made any provision therein.<sup>f</sup>

<sup>a</sup> L. 12, § 1, *D. de usu et habit.*

<sup>b</sup> L. 12, § 2, *D. de usu et habitat.*; — § 4, *Inst. de usu et habit.*; — d. l. 12, § 2.

<sup>c</sup> V. l. 10, *D. de usu et habit.*; — d. l. 1, §§ 1 et 2, l. 18, *cod.* See the ninth article of the second section, and the seventh article of the fourth section.

<sup>d</sup> V. l. 4, l. 22, § 1, *D. de usu et habit.*; — l. 15, *cod.*; — l. 13, *C. de usufr. et habit.*

<sup>e</sup> L. 2, *D. de usu et habit.*; — § 1, *Inst. de usu et habit.*; — l. 10, § 4, l. 12, § 1, *D. cod.*

<sup>f</sup> L. 22, § ult. *D. cod.*; — l. 12, § 1, *cod.*

## II.

972. *When the Use implies the Usufruct.*—If the fruits out of which he who has the use of them has a right to take whatever is necessary for his occasions are so inconsiderable on the ground of which he has the use, that there is precisely no more than what his occasions require, he shall have the whole, in the same manner as the usufructuary.\*

## III.

973. *He who has the Use ought not to incommode the Proprietor.*—He who has the use of a piece of ground has liberty to go into it to use his right, but without giving any trouble to the proprietor.<sup>d</sup>

## IV.

974. *The Use cannot be transferred to other Persons.*—Seeing the right of use is limited to the person of him to whom the use is granted, he can neither sell, let to hire, nor give away, a right which is personal to him, and which passing to another person might be more chargeable or more inconvenient to the proprietor.\* And if there should be any difficulty to know whether he who has the use may use his right otherwise than in person, it ought to be adjusted by the title, by the quality of the persons, and by the other circumstances.

## V.

975. *How the Use acquired to the Husband or the Wife is for both.*—The right of use, as also that of habitation, which accrues either to the husband or to the wife by a legacy, or other disposition made in prospect of death, is communicated from the one to the other; and they will use this right in common together during the life of the person to whom it is given.<sup>f</sup> For he who hath bequeathed either a use or a habitation to one of the parties joined together in wedlock, hath had no mind to exclude the other from sharing in it. But if a right of use of some fruits was

\* L. 15, D. de usu et habit.

<sup>d</sup> L. 11, D. de usu et habit.; — § 1, Inst. cod.

\* L. 11, in f. D. de usu et habit.; — § 1, in fin. Inst. cod.; — L. 12, § ult. D. cod. See the tenth article of this section.

<sup>f</sup> L. 2, § 1, D. de usu et hab.; — L. 4, § 1, cod. See the eighth article. L. 2, cod. — L. 2, § 2, in f. cod.; — L. 101, § 2, D. de cond. et demonstr.

bequeathed either to the husband or to the wife before they were married, the marriage happening afterwards would not make the condition of the proprietor worse; and the use would be limited to what had been regulated by the title. And it would be the same thing had the use been acquired by covenant, either before or after the marriage. And in all these cases, it is by the circumstances that we are to judge of the effect which the title ought to have.<sup>s</sup>

## VI.

976. *The Use lasts during Life.*—The right of use is not only for one or more years, but it lasts during the life of him who has the use, if it is not otherwise provided by the title of the said right.<sup>b</sup>

## VII.

977. *Definition of Habitation.*—Habitation is a right to dwell in a house, and he who hath this right hath as it were a use or a usufruct, according as his title extends or limits the right of inhabiting.<sup>1</sup>

## VIII.

978. *Habitation extends to the whole Family.*—The right of habitation extends to the whole family of the person who has this right. For he cannot dwell separately from his wife, his children, and his servants. And it is the same thing if this right belongs to the wife.<sup>1</sup> And this is understood likewise of the habitation which was acquired before the marriage.<sup>m</sup>

## IX.

979. *To what Places Habitation extends.*—Habitation extends, either to the whole house, or only to a part of it, according as it

<sup>s</sup> L. 34, D. de reg. jur. See the eighth article, with the remark on it.

<sup>b</sup> See the eleventh article of this section, and the first article of the sixth section.

<sup>1</sup> L. 2, § 1, D. de usu et hab. See the texts cited at the end of the preamble to this section. See the ninth article.

<sup>1</sup> L. 2, § 1, D. de usu et habit. See the fifth article of this section. L. 4, § 1, D. de usu et habit.

<sup>m</sup> L. 4, cod. What is said in this article, that habitation extends to the whole family, signifies that he who had this right may dwell with his whole family in the places that are subject to his habitation. But the meaning of this rule is not, that a habitation which is limited, for example, to one apartment, should extend to another, under pretext that the family of the person who has this right is straitened for want of room. See the fifth article.

appears to be regulated by the title. But if the habitation is given indefinitely, without naming either the whole house, or any part of it, but only either according to the condition or the necessities of him who acquires the right, it will comprehend all necessary conveniences, even although nothing should remain for the proprietor.\*

## X.

980. *The Right of Habitation may be transferred.*—He who has a right of habitation in a house, or in a part of it, may assign over and let out his right to another, without dwelling in the house himself, unless his condition is otherwise regulated by his title.†

## XI.

981. *The Right of Habitation is during Life.*—The right of habitation, as well as that of use, is not limited to a time, but it lasts during the life of the person who has the right.‡

## SECTION III.

## OF THE USUFRUCT OF THINGS WHICH ARE CONSUMED OR IMPAIRED BY USE.

982. *Usufruct of Movables.*—Things movable are either wholly consumed, or at least impaired, by use. Thus, grain and liquors are wholly consumed when one uses them; and cattle, hangings, beds, and other movables, suffer some diminution by use, and even by the bare effect of time, although they are not used; and at last these things perish. But nevertheless a kind of usufruct has been established of all movable things, and even of those which perish by being used. This usufruct is acquired two ways; either by a particular title, as if one makes a gift of the usufruct, or bare use, as of a suit of hangings or other movables; or by a general

\* L. 15, *D. de usu et habit.*;—l. 18, *D. de usu et hab.* We see in this last law both the cases; one, where the habitation extends to the whole house; and the other, where it is confined to a part of it. See the seventh article of this section.

† L. 13, *C. de usufr.*;—§ 5, *Inst. de usu et habit.*

‡ L. 34, *D. de reg. jur.* See the fourth article of this section.

§ L. 10, § 3, *D. de usu et habit.* See the sixth article.

title, if they chance to be comprehended in a totality of goods, such as a succession, of which one has the usufruct. And it is this kind of usufruct of which the rules shall be the subject-matter of this section.

## ART. I.

983. *Usufruct of all Sorts of Things.*—Although it seems not to be natural that we should have the usufruct of movable things which perish in the use, such as corn and liquors; yet the laws have received a kind of usufruct of this sort of things, as of all others which we are capable of possessing.<sup>a</sup> For in effect there is not any one of these things from which we may not draw some use, and we may establish in them a kind of usufruct, according to their nature, by the following rules.

## II.

984. *Usufruct of Movable Effects in a Totality of Goods.*—He who has the universal usufruct of a totality of goods has also the right to enjoy and use all the movable effects according to their nature; to consume what is liable to be consumed in its ordinary use; to gather from the living creatures the profits which they yield; to receive the interest of debts which bear interest; and to make use of every thing according to its natural use, either for its revenue, or for its conveniency, or for bare pleasure.<sup>b</sup>

## III.

985. *In what this Usufruct consists.*—The usufruct of movable things which are not consumed immediately by the use of them consists in the right of enjoying them, and employing them as the proprietor would do, by putting them to the use for which they are designed, without abusing them, and taking due care of them. Thus, a suit of hangings, of which one has the usufruct, may continue hung up, and the other movables may likewise be employed to their several uses; and they shall be restored to the proprietor in the condition in which they shall happen to be after the usufruct is expired, although wasted and diminished by the effect of the use, provided the usufructuary hath not misused them.<sup>c</sup>

<sup>a</sup> L. 1, D. de usufr. ear. rer. quæ usu. cons.; — l. 3, cod.; — l. 2, cod.; — § 2, Inst. de usufr.

<sup>b</sup> L. 29, D. de usufr.; — l. 34, § 2, cod.; — V. l. 1, C. cod.; — l. 3, § 1, D. cod.; — l. 7, cod.; — l. 28, cod.; — l. 41, cod.; — l. 3, D. de usufr. ear. rer. quæ usu. cons.

<sup>c</sup> L. 15, § 4, D. de usufr.; — d. l. § 5; — l. 9, § 3, D. de usufr. quæ ear.

## IV.

986. *Usufruct of Living Creatures.*—The usufructuary who has living creatures in his usufruct may draw from them the revenues and services which the master himself would draw. Thus, he may employ the oxen in carriage and tillage, the horses either to carry and draw, or to till the ground, or to ride upon, according to the uses for which they are destined; the sheep to dung the grounds; and from them he may likewise draw the profit of the lambs, the milk, and the wool.<sup>d</sup>

## V.

987. *The Usufructuary of a Herd of Cattle ought to supply out of the Fruits the Places of those which die.*—If it is of a stud of mares, a herd of cattle, or a flock of sheep, that one has the usufruct, the usufructuary will have the colts, the calves, the lambs, the wool, and all the services and other profits, according to the nature and use of these animals;<sup>e</sup> but still on condition that he preserve entire the number which he hath received, and that, when any of them die, he fill up their places out of the fruits. For it is enough for him to enjoy the profits which he reaps from the animals, and to have over and above whatever exceeds the number which he is bound to keep entire.<sup>f</sup>

## VI.

988. *The Usufructuary of Animals which do not produce young ones is not obliged to supply the Places of those that die.*—If it happens that the usufruct is of such animals as cannot produce young ones for supplying the places of those that die, such as a set of horses or mules, or any one beast alone, the usufructuary will not be bound to fill up the place of that which dies,<sup>g</sup> if its death happens without his fault.

## VII.

989. *Usufruct of Things which are consumed by Use.*—The usufruct of things which are consumed in the use carries along with it the property of them, since one cannot use them but by consuming them. But the usufructuary is distinguished from the

<sup>d</sup> L. 12, § 3, *D. de usu et habit.*; — d. l. 12, § 4; — d. l. § 2.

<sup>e</sup> See the preceding article.

<sup>f</sup> L. 68, § ult. *D. de usufr.*; — l. 70, § 2, *cod.*; — d. l. § 42.

<sup>g</sup> L. 70, § 3, *D. de usufr.*

proprietor, in that he is obliged, after the usufruct is expired, to restore, according as his title obliges him, either an equal quantity of the same kind with that which he received, or the value of the things at the time he received them.<sup>b</sup> For it is of this value that he has had the usufruct.

## VIII.

990. *It is equal whether one has the Use or Usufruct of Things which are consumed in the Use.* — It is the same thing whether we have the use or usufruct of things which are consumed in using, such as money, grain, liquors. For he who has the use of these things enjoys them as much as he who has the usufruct of them, since he disposes of them as if he were master of them.<sup>1</sup>

## IX.

991. *The Bounds and Extent of the Use of Movables.* — The use of all other movable things hath its limits and its extent according to the title which establishes it; and it is regulated either by the intention of the parties contracting, if the title is a contract, or by that of the testator, if it is a testament. And we judge of the said intention either by the terms of the title, or by the circumstances, such as that of the quality of the person to whom the use of these things has been given, of the motive of the person who gave it, of the use which he himself made of it, and other circumstances of the like nature. Regard is also to be had to the custom of the place, if there be any to which the title may have relation. And it is by these principles that we ought to judge, if, for example, a use of movables comprehends all movable things without exception, or only some of them, and in what manner we are to make the distinction: if it extends to all sorts of services and profits which one may draw from them, or if it is limited to some particular services, and to some profits.<sup>2</sup>

## X.

992. *If the Usufructuary of Movables can let them out.* — He who has the usufruct of movable things of which the use consists in letting them out to hire, such as a boat for carrying merchandise,

<sup>b</sup> L. 7, D. de usufr. ear. rer. qua usu cons. See the second article of the fourth section.

<sup>1</sup> L. 2, § ult. D. de usufr. ear. rer. qua usu cons. ; — l. 10, § 1, cod.

<sup>2</sup> See the first article, and the fifth article of the second section; as also the laws cited on the fourth article of this section, and the following article.

a ship for a voyage by sea, may let such things to hire. But he cannot let out those things which are not destined to be let to hire. For although the usufruct gives a full right to enjoy all the profit which may be drawn from the things that are subject to it, yet this right in movables ought to have its bounds, because the misuse of them may destroy or damage them. So that the ways of using them ought to be regulated according to the title, and according to the circumstances of the quality of the persons, the nature of the things, the use which a good and careful husband ought to make of them, and other the like circumstances.<sup>1</sup>

## SECTION IV.

OF THE ENGAGEMENTS OF THE USUFRUCTUARY, AND OF HIM WHO HAS THE BARE USE, TO THE PROPRIETOR.

### ART. I.

993. *The Usufructuary ought to make an Inventory of the Things subject to the Usufruct.* — The first engagement of the usufructuary is to charge himself with the things of which he has the usufruct, whether they be movables or immovables: and to make an inventory of them in writing, in presence of the persons interested, that it may appear in what things they consist, and in what condition they are when he receives them: in order to regulate what he is to restore after the usufruct is expired, and in what condition he ought to give the things back.<sup>a</sup>

### II.

994. *He ought to give Security to make Restitution.* — The second engagement of the usufructuary is to give the necessary security to the proprietor for the restitution of the things of which he has the usufruct; whether by his bare promise of making restitution or by giving surety for his doing it, according as the title of the usufruct may oblige him, or the circumstances of the nature of the things, of the quality of the persons, and others of the like nature, may demand. As if it is a usufruct of things which perish in the use, or which may be easily damnified. And the

<sup>1</sup> L. 15, § 4, *D. de usufr.*; — d. l. § 5; — l. 12, § 4, *D. de usu et habit.* See the foregoing article.

<sup>a</sup> L. 1, § 4, *D. de usufr. quem cav.* For this usage see the seventh article.



security for restitution implies likewise that of restoring the things in the condition in which they ought to be.<sup>b</sup>

### III.

995. *He ought to take Care of the Things subject to the Usufruct.*—The third engagement which the usufructuary is under is to preserve the things of which he has the usufruct, and to take the same care of them as a good husband would do of what belongs to him.<sup>c</sup> Thus he who has the usufruct of a house ought to be watchful against fire. Thus, he who has the usufruct of beasts ought to take care that they be well kept, fed, and looked after.

### IV.

996. *He ought to use the Things as a good Husband would do.*—The fourth engagement of the usufructuary is to use and enjoy the things of which he has the usufruct in the same manner as a good husband would do, drawing from them such advantages as he can make, without misusing or damnifying them, and without changing even what is destined for bare pleasure, although it were to improve the revenue. . Thus, he cannot cut down the trees of an avenue in order to make a kitchen garden, or to sow corn in the place.<sup>d</sup>

997. *He ought to acquit the Charges.*—The fifth engagement of the usufructuary is to acquit the charges of the things of which he has the usufruct, such as the land-tax, and other imposts and public duties, even those which may chance to be imposed after the usufruct has been acquired, the quitrents, ground-rents, and other charges.<sup>e</sup>

### VI.

998. *He ought to make the Repairs.*—The sixth engagement which the usufructuary lies under is to be at the necessary expenses for preserving and keeping in good case the places and other things of which he has the usufruct. Such as to make the

<sup>b</sup> L. 1, D. de usuf. quem cav.; — l. 13, D. de usuf.; — l. 8, § 4, D. qui satisfacere cog.; — l. 4, C. de usuf.; — l. 7, D. de usuf. ear. rer. quæ usu cons.; — l. 1, C. de usuf.

<sup>c</sup> L. 65, D. de usuf.; — l. 1, D. de usuf. quem cav.; — l. 4, C. eod.

<sup>d</sup> L. 13, § 1, D. de usuf.; — d. l. § 3; — l. 13, § 4, D. eod.

<sup>e</sup> L. 27, § 3, D. de usuf.; — l. 28, eod.

small repairs of a house, to plant trees in the room of those which die in the ground, to manure and improve the lands, and to make the other lesser repairs, and to lay out the expenses which may be necessary for the cultivation and preservation of the places. But he is not bound to be at the charge of the greater repairs, such as the rebuilding of a house that is fallen without any neglect of his.<sup>1</sup>

## VII.

999. *Engagements of the Person who has the bare Use.* — All the engagements of the usufructuary are common to him who has the bare use, in proportion to his right of use. Thus, when his right gives him the whole thing, as if he has a right to inhabit a whole house, he ought to charge himself with what is delivered to him, to give the necessary security, take care of the places, use them without misusing or damaging them, make the repairs, and bear the other charges which the usufructuary would be bound to do. But if his right is limited, as if he has only a part of a house, he is liable to repairs and other charges only in proportion to what he possesses.<sup>2</sup>

## VIII.

1000. *The Relinquishing of the Usufruct or Use to avoid the Charges.* — If the usufructuary, or the person who has the bare use, chooses rather to relinquish his right than to bear the charges of it, he will be freed from the charges, except only those which became due in the time of his enjoyment, and the wastes which either he himself, or the persons for whom he is accountable, may have committed. And he will have the same liberty of relinquishing his right, even after he has been condemned in a court of justice to acquit the charges to which he was liable.<sup>3</sup>

<sup>1</sup> E. 7, *Code usuf.*; — l. 7, § 2, *D. de usuf.*; — l. 18, *ead.*; — l. 4, § 1, *D. de oper. serv.*

<sup>2</sup> L. 18, *D. de usu et hab.*

<sup>3</sup> L. 64, *D. de usuf.*; — l. 65, *ead.*

## SECTION IV.

OF THE ENGAGEMENTS WHICH THE PROPRIETOR IS UNDER TO THE USUFRUCTUARY, AND TO HIM WHO HAS THE BARE USE.

## ART. I.

1001. *The Proprietor ought to leave the Enjoyment of the Fruits, and the Use, free.*—The proprietor is bound to deliver to the usufructuary, and to him who has the bare use, the places and other things subject to the usufruct, or to the use; or to suffer him to take possession of them, without putting him to any trouble or inconvenience. And the persons who have these rights may sue the proprietor, as well as all other possessors of the things subject to the said rights, for a liberty to enjoy them.<sup>a</sup>

## II.

1002. *He cannot change the Condition of the Places, although to the better.*—The proprietor cannot, either before or after the delivery, make any change in the places and other things subject to a usufruct, or use, by which the condition of the usufructuary, or of him who has the use, is made worse, although it were to make improvements. Thus, he can neither raise a building higher, nor make a new one, in a ground where none was before; unless it be with the consent of the usufructuary, or him who has the use. Much less can he grub up a wood, pull down an edifice, impose services on it, or make any other changes that may be of prejudice to the usufructuary, or him who has the use. And if he has done it, he will be liable for the damages and losses which he shall have occasioned.<sup>b</sup>

## III.

1003. *He ought to remove the Obstacles against which he is Guarantied.*—If the usufructuary, or the person who has the use, cannot have the enjoyment because of some obstacle which the proprietor is bound to remove, he shall be bound to get it removed, and to make good the losses and damages which are

<sup>a</sup> L. 5, § 1, D. si usufr. pet.

<sup>b</sup> L. ult. D. de usu et habit.;—l. 7, § 1, in fin. D. de usufr.;—l. 2, D. de usufr. pet.;—l. 15, § ult. D. de usufr.

sustained by the non-enjoyment.<sup>c</sup> As if there were an eviction, or some other trouble, against which the proprietor is bound to warranty, or if he should refuse him any necessary service which he is bound to give, as in the case of the fourteenth article of the first section.

## IV.

1004. *He ought to reimburse what is laid out on Repairs, which he himself is bound to make.*—If the usufructuary has made any necessary repairs beyond those which he is bound to make, the proprietor ought to reimburse him for what he has laid out on that account.<sup>d</sup>

## V.

1005. *The Usufructuary enjoys the Things in the Condition he finds them.*—The proprietor is not bound to rebuild, or restore to good condition, that which happens to be demolished or damaged at the time that the usufruct is acquired, unless he himself were the author of the damage, or he were obliged by his title to put the things in a good condition. But the usufructuary is restrained to the right of enjoying the thing in the condition in which it is at the time when he acquires his right; in the same manner as he who acquires the property of a thing ought to have it only such as it was at the time when he acquired it.<sup>e</sup>

## SECTION VI

## HOW USUFRUCT, USE, AND HABITATION EXPIRE.

## ART. I.

1006. *These Rights expire by the Death of the Usufructuary, and of him who hath the Use.*—Usufruct, use, and habitation expire by the natural death, and by the civil death of the person who had the right to them, because this right is personal.<sup>f</sup>

<sup>c</sup> This is a consequence of the right of the usufructuary. L. 1, § 1, D. de usufr. pot.;—l. 5, § 3, et § ult. D. eod.

<sup>d</sup> L. 7, C. de usufr.

<sup>e</sup> L. 65, § 1, D. de usufr.

<sup>f</sup> L. 3, § ult. D. quib. mod. usufr. amitt.;—l. 3, C. de usufr.;—l. 16, in f. C. de usufr.;—§ 3, Inst. de usufr.

## II.

1007. *And when the Time which they ought to last is elapsed.* — If the title of the usufruct, of the use and habitation, has limited the right to it to commence or determine at a certain time, or upon the existence of a certain condition, the right will not commence, nor determine, till the condition shall happen, or the time be elapsed.<sup>b</sup>

## III.

1008. *Restitution of the Usufruct to a third Usufructuary.* — If the usufructuary is charged to restore the usufruct to another person, his right to the usufruct will determine whenever the time of making the said restitution comes.<sup>c</sup>

## IV.

1009. *If the Thing perishes.* — The right of usufruct is limited to the thing on which it is assigned, and does not affect the other goods. So that it expires whenever the land or tenement, or other thing which is subject to it, happens to perish before the death of the usufructuary, or of the person who has the use; as if a piece of ground be carried away by an inundation, or a house be burnt down or ruined. And in this last case, the usufructuary would not even have the usufruct of the materials, nor of the place on which the house stood. For the usufruct was specially settled upon a house; and it was restrained to what was specified in the title.<sup>d</sup>

## V.

1010. *Inundation.* — If a piece of ground were overflowed, either by the sea or by a river, the usufruct and the use would not be lost, except during the continuance of the inundation; and it would be restored, if the ground, or any part of it, returned to such a condition as one might enjoy it, because the ground would not have changed its nature.<sup>e</sup>

<sup>b</sup> L. 16, D. quib. mod. usufr. vel us. am.; — l. 17, eod.; — v. l. 12, D. de usufr.

<sup>c</sup> L. 4, D. quib. mod. usufr. vel us. am.

<sup>d</sup> L. 2, D. de usufr.; — § 3, in f. Inst. de usufr.; — l. 5, § 2, D. quib. mod. usufr. vel us. am.; — l. 34, § ult. D. de usufr.

<sup>e</sup> L. 23, D. quib. mod. usufr. vel us. am.; — l. 24, eod.; — l. 53, D. de usufr.

## VI.

1011. *Usufruct of what remains of the Land or Tenement.* — If it happens that a part of a house perishes, and that there remains another part of it, the usufruct will be preserved of that part of the house which remains, and of the place on which stood the part of the house which is destroyed. For the said place makes a part of the said house, and is an accessory to the part of it that remains.<sup>f</sup>

## VII.

1012. *Difference between a Universal Usufruct, and one that is Particular.* — In the cases in which the thing subject to a usufruct happens to perish, we ought to observe this difference between the usufruct of a totality of goods, and that of a particular thing; that whereas the particular usufruct of a house, for example, is extinct in such a manner whenever the house perishes, either by a fall, or by fire, or other casualty, that the usufructuary has no manner of usufruct in the place which remains; on the contrary, if his usufruct was universal of all the goods, he shall have the usufruct of the place where the house stood, and of the materials which may chance to remain; for they are a part of the totality of goods.<sup>g</sup> And it would be the same thing in the usufruct of a country farm, where the buildings shall happen to go to ruin; for in this case the usufruct would be preserved on the place which should remain, as being an accessory, and making a part of the whole of the said farm.<sup>h</sup>

## VIII.

1013. *Changes in the Land or Tenement.* — If there happens any change in the thing subject to a usufruct; as if a pond is dried up, if arable land becomes a marsh, if a forest is converted into meadow, or arable ground; in all these and the like cases, the usufruct either ceases, or does not cease, according to the quality of the title of the usufruct, the intention of those who settled it, the time when these changes happen, whether before the usufructuary has acquired his right, or only after, the causes of these changes, and the other circumstances. Thus, in a usufruct of the whole goods, no change extinguishes the usufruct of what remains; and the usufructuary enjoys the thing in the con-

<sup>f</sup> L. 53, D. de usufr.<sup>g</sup> L. 34, § ult. D. de usufr.; — d. l. in fine<sup>h</sup> L. 8 et 9, D. quib. mod. usufr. v. us. am.

dition to which it is reduced. Thus, in a particular usufruct bequeathed by a testator of some piece of ground, if he himself changes the face of the places after he has made his testament, and of a meadow, for instance, of which he had devised the usufruct, he makes a house and a garden; in these and the like cases, where the changes in the things denote the change of the will, they annul the legacy of the usufruct, which was limited to things that are no longer in being. But in a usufruct that is acquired by covenant, the proprietor is not at liberty to make what changes he pleases; and he who should change the nature or condition of the things, without the consent of the usufructuary, would be bound to indemnify him. And as to the changes which happen by casualties, whether before or after the usufruct is acquired, it determines, or is preserved, according to the foregoing rules, and to what happens to be regulated by the usufructuary's title.<sup>1</sup>

## IX.

1014. *The Remainder of the Thing which is destroyed belongs to the Proprietor.* — If the thing subject to a usufruct chancas to perish, or comes to be changed in such a manner that the usufruct subsists no longer, what remains of the thing belongs to the proprietor. Thus, the materials of a house that is demolished, the hides of the beasts of a herd of cattle which should happen to perish through some accident, ought to be delivered to the proprietor; for the right of the usufructuary was limited to the enjoyment of what was in being, and it is extinct by this change.<sup>1</sup>

## TITLE XII.

## OF SERVICES.

1015. *The Origin of Services, and their Use.* — The order of civil society not only subjects mankind one to another, by the wants which render the reciprocal use of offices, services, and intercourse between man and man necessary, but it renders it

<sup>1</sup> L. 10, § 2, *D. quib. mod. usufr. vel us. am.*; — *d. l. § 3*; — *d. l. § 4*; — *l. 5, § ult. cod.*  
*L. 5, § 2, D. quib. mod. usufr. vel us. am.*; — *l. pen. cod.*

moreover necessary for the use of things, that there should be subjections, dependences, and connections between one thing and another, without which there is no putting them in use. Thus, for things movable, there are none of them, or but very few, that come to our hands in the condition in which they ought to be for our service, but through a concatenation of the use of many other things; whether it be for digging them out of the places from whence they are to be fetched, or for making them fit for use, or for applying them to effectual service. Thus, for immovables, there are none of them likewise, or but a few, from which one may reap either the fruits, or the other revenues, except by the use of divers things; and even oftentimes by making one ground or tenement serve for the use of another; as we make, for instance, one piece of ground serve for giving passage to another, or one house for receiving the water that falls from another neighbouring house. It is these sorts of subjections of one land or tenement for the use of another, which we call *services*; but we do not give this name to the subjections which render one movable thing necessary for the use of another thing, whether movable or immovable.

1016. These services have two characters, which distinguish them from all other use that may be made of one thing for the use of another. The first is, that they are perpetual;<sup>a</sup> whereas every one of the other subjections is of no duration. And the other is, that, in these services of lands and tenements, the land or tenement subject to the service belongs always to another owner than the person who is master of the land or tenement to which the service is due. For we do not give the name of service to the right which the master of a land or tenement has to make use of it for himself.<sup>b</sup>

1017. It is these kinds of services which subject the land or tenement of one person to the use and service of the land or tenement of another, which shall be the subject-matter of this title; which we have placed among covenants, because services are most commonly settled by covenant,<sup>c</sup> as in a sale, in an exchange, in a transaction, in a partition; and although they are sometimes established by testament, or by a decree of a court of justice, yet

<sup>a</sup> L. 28, D. de serv. præd. urb.

<sup>b</sup> L. 10, D. cum præd.; — L. 26, D. de servit. præd. urban.

<sup>c</sup> L. 5, D. de servit.; — § ult. Inst. de servit. See before, at the beginning of the title of *Unfruct.*



it was more proper to bring in in this place a matter which cannot be inserted in many places, and which is ranked here according to its natural order.

## SECTION I.

OF THE NATURE OF SERVICES, OF THEIR KINDS, AND THE MANNER  
HOW THEY ARE ACQUIRED.

### ART. I.

1018. *Definition of Service.*—Service is a right which subjects a land or tenement to some service, for the use of another land or tenement, which belongs to another master; as, for example, the right which the proprietor of an estate has to pass through the grounds of his neighbour, to get at his own.<sup>a</sup>

### II.

1019. *In what Service consists.*—All services give to the persons to whom they are due a right which they would not have naturally; and they diminish the liberty of the use of the land or tenement which owes the service, subjecting the owner of the said land or tenement to what he ought either to suffer, or do, or not do, for leaving the use of the service free. Thus, he whose land is subject to a right of passage ought to bear with the inconveniency of the said passage; thus, he whose wall ought to bear the building that is raised upon it is bound to repair the said wall, if there be occasion; thus, all those who owe any service can do nothing that may trouble the use of it.<sup>b</sup>

### III.

1020. *Services are for Lands and Tenements.*—Although services be properly for the behoof of persons, yet they are called real, because they are inseparable from lands or tenements. For it is a land or tenement that serves for another land or tenement;

<sup>a</sup> L. 1, *D. de servit.*; — l. 1, *D. de servit. præd. rust.*

<sup>b</sup> L. 15, § 1, *D. de serv.*; — l. 6, § 2, *D. si servit. vindic.* It follows from the rule explained in this article, that, in all disputes about services, one of the parties endeavours to subject the land or tenement of the other against natural liberty, and the other stands up for this liberty; which makes the cause of him who denies the service to be the most favorable, as shall be explained in the ninth article. L. 2, *D. si serv. vind.*; — § 2, *Inst. de act.*

and the said service does not pass to the person but because of the land or tenement. Thus, one cannot have a service which consists in the right of going into another man's ground, to gather fruit, or to walk in it, nor for other uses which have no relation to that of a land or tenement.\* But such a right would be of another nature, as, for example, it would be a letting to hire, if the right were purchased for a sum of money.

## IV.

1021. *Divers Sorts of Services.*—Services are of several sorts, according to the divers kinds of lands or tenements, and the different uses which may be made of one land or tenement for the service of another. Thus, for houses, and other buildings, the one is subjected for the use of the other, either not to be raised higher, or to receive the waters which fall from the other, or to bear some part of the weight of the other house, by fixing a beam in the wall, and the like: and for lands, one is subjected for the use of the other, either to a passage, or to a draught of water, or to other rights of a different sort.<sup>4</sup>

## V:

1022. *Two General Kinds of Services.*—All services are comprehended under two general kinds; one is, of such as are natural, and of an absolute necessity, as the discharge of the water of a spring, which runs into the ground which is below: the other is, of those which nature does not make absolutely necessary, but which men establish for a greater conveniency, although the land or tenement which serves be not naturally subjected to the other. As if it is agreed that a house shall not be raised higher, that it may not hinder the prospect of another house; that it shall receive the waters falling from the adjacent house: that the possessor of a piece of ground may draw water out of a spring or a rivulet in the neighbouring ground, either at certain times, such as to water his grounds; or for constant use, such as to convey water in a pipe through a neighbouring ground, for the use of a fountain.\*

\* L. 1, *D. de servit.*; — l. 1, § 1, *D. comm. præd.*; — l. 8, *cod.*; — § 3, *Inst. de servit.*; — l. 1, § 1, *D. de servit. præd. rust.*; — l. 20, § ult. *cod.*

\* L. 2, *D. de servit. præd. urban.*; — l. 1, *D. de servit. præd. rust. passim his titulis.*

\* This is a consequence of the nature of services. See hereafter, the tenth article of this section.

## VI.

1023. *Services of Houses and Lands.*—All the kinds of services are either for the use of houses and other buildings; or for the use of lands, such as meadow ground, arable land, orchards, gardens, and others; whether they be situated in town or country.<sup>1</sup>

## VII.

1024. *Accessories to Services.*—The right of service comprehends the accessories, without which it cannot be used. Thus, the service of drawing water out of a well or spring implies the service of a passage to get to the well: thus, the service of a passage implies the liberty of building or repairing a work that is necessary for making use of the said passage; and if the work cannot be made in the place allotted for the passage, one may work in the adjacent parts, according as the necessity requires; but in repairing, one ought not to make any innovation in the ancient condition of the place.<sup>2</sup>

## VIII.

1025. *Services are regulated by their Titles.*—The right and use of a service is regulated by the title which establishes it: and it hath its bounds and its extent according as has been covenanted, if the title is a contract; or according to what has been prescribed by the testament, if the service has been established by testament. Thus, he to whom a service is due cannot make its condition heavier, neither can the person who owes the service prejudice the right of him to whom it is due; but both the one and the other ought to stand to the title, whether it be with respect to the quality of the service, or to the manner in which the one ought to use it, and the other to suffer it. Thus, for instance, if a right of passage is granted only for one to go on foot, he cannot make use of it to go on horseback; and if the passage is granted only for the daytime, it gives no right to pass in the night. But if the manner of using the service were uncertain; as if the place necessary

<sup>1</sup> L. 1, D. de servit. In the Roman law, all houses and buildings whatsoever, whether in town or country, were called: *prædia urbana*; and all lands, whether meadows, arable lands, or vineyards, have the denomination of *prædia rustica*. L. 198, D. de servit. agri.

<sup>2</sup> Inst. de servit.

<sup>3</sup> L. 3, § 3, D. de servit. præd. rust.;—l. 10, D. de servit.;—l. 11, D. de servit. præd. rust. d. l. 11, § 1;—l. 3, § 15, D. de itin. actusque priv.

for a passage were not regulated by the title, it would be settled by the advice of skilful persons.<sup>1</sup>

## IX.

1026: *Services are interpreted favorably for Liberty.*— Seeing services derogate from the liberty that is natural to every one to make use of what is his own, they are restrained to what is precisely necessary for the use of the persons to whom they are due; and one lessens the inconveniency of them as much as is possible. Thus, he who has a right of passage through another man's field; and whose title does not specify the place through which he may pass, has not the liberty of choosing his passage wheresoever he pleases; but it will be assigned him through the place that is least inconvenient to the proprietor of the ground which serves; and not, for example, across a plantation, or through a building. But if the title of the service, or the possession, regulates the passage, although it be through a place that is very inconvenient for the proprietor of the ground which serves, yet he must stand to it.<sup>1</sup>

## X.

1027. *Services that are necessary may be decreed by the Judge.*— Services are established and acquired, not only by covenant, or by testament,<sup>1</sup> but also by authority of justice, if the services which are refused be naturally necessary. Thus, when the proprietor of a piece of ground cannot go to it without passing through a neighbouring ground, the judge obliges the proprietor of the said ground to grant the passage through the place that is least inconvenient, allowing him a suitable recompense for his loss.<sup>2</sup> For this necessity is in place of a law; and natural equity demands that a ground should not remain useless, and that the said proprietor ought to suffer for his neighbour what he would wish others to suffer for him in the like case.

<sup>1</sup> L. 4, D. de servit.; — d. l. 4, § 1; — v. l. 29, D. de serv. præd. rust.; — l. 14, D. comm. præd.; — l. 14, D. si servit. vind.; — d. l. § 1; — l. 13, § 2, D. de servit. præd. rust.; — d. l. § ult.; — l. 11, § 1, D. de serv. præd. urb.

<sup>2</sup> L. 28, D. de servit. præd. rust.; — l. 9, D. de serv.; — l. 21 et 22, D. de servit. præd. rust. See the second article, and the remark that is made upon it.

<sup>3</sup> L. 9, D. de servit. See before, the beginning of the title of *Usufruct*.  
<sup>4</sup> L. 12, D. de relig. See the case of this law in the fourth article of the thirteenth section of the *Contracts of Sale*.

## XL

1028. *Services may be acquired by Prescription.*—The right of service may be acquired without a title, by prescription.\*

## XII.

1029. *The Manner of the Service may be known by the Condition of the Places.*—The proof which may be drawn from the ancient condition of the places is a kind of title for preserving and establishing a service by prescription. And it serves also to regulate the manner and use of the service. Thus, the entry of a passage, the bounds of a way, a skylight in a house, a water-pipe clapped on against a wall, a roof of a house with a jutting out, and other the like marks of services, regulate the use of them. And it is not permitted either to him who hath the service, or to him who ought to suffer it, to innovate any thing in the ancient condition of the places.º

## XIII.

1030. *Services are lost or diminished by Prescription.*—Seeing a service may be acquired by prescription, with much more reason may a freedom from a service be acquired the same way. And if he whose land or tenement was subject to some service has freed himself from it, during a time sufficient for acquiring a prescription, the service subsists no longer. Thus, he whose house was subjected to the service of not being raised higher, is not any more subject to the said service, if, after having raised his house higher, he has possessed it so raised during the time required for prescription.º And it is the same thing as to the manner of using a service: thus, he who had a right to a draught of water both by day and night loses the use of drawing it in the night-time, if he lets it prescribe; and if his service was either at all hours, or only at some, he is restrained to those to which the prescription shall have limited him.

\* L. 10, D. si servit. vind.; — l. 5, § 3, D. de itiner. act. priv.; — l. 1, C. de servit.; — l. 2, § 2, D. de servit. præd. rust. There are some customs, in which the right of service cannot be acquired by prescription, without a title; although liberty from services may be there acquired by prescription. See the thirteenth article of this section, and the fifth and following articles of the sixth section.

º D. l. 1, C. de servit.; — l. 11, D. de servit. præd. urban.

º L. 4, § ult. D. de usurp. et usuc.; — l. 32, § 1, D. de servit. præd. urb.; — L. 10, § 1, D. quemad. servit. amitt. See the fifth and following articles of the sixth section.

XIV.

1081. *Services are annexed to the Lands and Tenements.*— Services being annexed to the lands and tenements, and not to persons, they cannot pass from one person to another, unless the land or tenement passes likewise. And he who has a right of service cannot transfer it to another, keeping the land or tenement to himself, nor assign over, let out, or lend the use of it. Thus, he who has a draught of water cannot share it with others. But if the land or tenement for which the draught of water was established be divided among many proprietors, as among coheirs, co-legatees, joint purchasers, or otherwise; each share will retain the use of the service in proportion to its extent, although some shares should stand less in need of it, or the use of it were less serviceable to them than to the others.<sup>1</sup>

XV.

1032. *The Property of the Place which serves belongs to the Master of the Land or Tenement that owes the Service.*— The part of the land or tenement that is subject to a service out of which the service is taken, such as the way for a passage, belongs to the master of the land or tenement which serves; and he who receives the service has no right of property in that part of the land or tenement that serves, but only a right to use it for his service.<sup>2</sup>

XVI.

1033. *A Service may be for the Use of two Lands or Tenements.*— One and the same service may serve for the use of two lands or tenements. Thus, a discharge of water may serve for two houses: thus, a passage, or an aqueduct, may serve for two or more lands or tenements.<sup>3</sup>

XVII.

1034. *A Service which appears to be useless.*— Although a service may appear to be useless, such as a draught of water to him whose land or tenement is in no want of it, or who has water enough in his own grounds; yet one may retain or purchase such

<sup>1</sup> L. 24, D. de servit. præd. rust.; — l. 33, § 1, D. eod. See the fifth article of the *Abbas de servit.*

<sup>2</sup> L. 25, D. de servit. præd. rust.; — l. 4, D. si servit. vind.

<sup>3</sup> L. 15, D. com. præd.

service. For, besides that one may possess things that are not subject to service, it may so happen that there may be occasion to use them as a man

## XVIII.

1035. *Of Lands and Tenements which have several Owners.*—He who has the property of an estate only in common with others, without any division of the several shares, cannot subject any part of it to a service without the consent of all his copartners; and any one of them may hinder it, until that the estate being divided into shares, every one may impose a service on his own share, if he thinks fit. And, likewise, he who possesses in common and undivided a portion of the land or tenement to which the service is due, cannot by himself free the land or tenement which owes the service; but the service remains for the portions of the others. For the services are for every part of the land or tenement to which they are due, and every one of the proprietors has an interest in the service for his own portion.\*

## XIX.

1036. *Possession of Services by Tenants, and other Possessors.*—Services are preserved against prescription, not only by the use that is made of them by the proprietors of the lands or tenements to which they are due, but likewise by the use made of them by all other possessors, who are in the place of the master; such as farmers, tenants, usufructuaries, and even those who possess wrongfully; for they preserve to the master the possession of his service.†

## XX.

1037. *Possession of one alone for the Service common to many.*—If a service be due for the use of a land or tenement belonging in common to many persons, the possession of one of the partners preserves the service for all the rest; for it is in the name of all the partners that he possesses. But if many persons have each of them their several right of service in particular, although it be in the same part of the land or tenement which owes the service,‡

\* L. 19, *D. de servit.*

† L. 2, *D. de servit.*; — l. 34, *D. de servit. præd. rust.*

‡ *D. l. 34.*; — l. 8, § 1, *D. de servit.*; — l. 23, § ult. *D. de servit. præd. rust.* See the seventh article of the fourth section.

§ L. 20, *D. quemadmodum serv. amitt.*; — l. 24, *D. eod.*

yet every one preserves only his own right, and prescription may run against the others who do not use their right.<sup>a</sup>

## XXI.

1038. *The Privilege of one Partner hinders Prescription against the others.* — If one of the proprietors of a land or tenement belonging to them in common, and to which a service is due, has any quality which hinders prescription from running against him, as if he is a minor, the service is not lost, although all the proprietors cease to use it, because the minor preserves it for the whole land or tenement.<sup>a</sup>

## SECTION II.

OF THE SERVICES OF HOUSES AND OTHER BUILDINGS.

## ART. I.

1039. *Services of Buildings.* — The services of houses and other buildings are of several sorts, according to their wants; such as that of receiving the water that falls from another house, the lights of a house, the prospect, a right of fixing a beam in another's wall, a passage, and others of the like nature.<sup>a</sup> But there is none of them which is naturally necessary, and in such a manner as that he who builds on his own ground can oblige his neighbour to suffer a service for the use of his building, if he has neither a title nor a right of possession to justify it. For he may and ought to raise his building wholly on his own ground, keeping the necessary distance, and not encroaching any ways on his neighbour's ground which joins to his.<sup>b</sup> And if any service is necessary to him, and he has it not, he cannot acquire it but by a mutual consent.

## II.

1040. *Discharge of Waters from the Houses.* — The right of discharging the waters from off the roof of a house is a service which

<sup>a</sup> L. 6, D. quemad. serv. amitt.

<sup>b</sup> L. 10, D. quemad. serv. amitt.

<sup>c</sup> L. 2, D. de servit. prad. urban.; — § 1, Inst. de servit.

<sup>d</sup> L. 14, D. de servit. prad. urb.; — V. l. 12, C. de adif. priv. See the eighth and ninth articles of this section.



may be differently established, either in such a manner that the whole roof may have a jutting out on another man's ground, and so let its waters drop from the eaves there; or all its water may be gathered together, and run through one gutter jutting out from the building, or through a pipe clapped on against the wall.<sup>c</sup>

### III.

1041. *A Sink or Drain.*—The discharge of a sink or drain into a neighbouring ground is a service for the use of a house, and one may establish others of the like nature, according as occasion requires.<sup>d</sup>

### IV.

1042. *The Lights and Prospect of a House.*—The lights of a house are open places for receiving light into a chamber or other room; and a prospect hath, besides the light, an open view of the adjacent parts, whether in town or country.<sup>e</sup>

### V.

1043. *The Services for the Lights of a House are of Two Sorts.*—The services for the lights of a house are of two sorts. One is of those which give to the proprietor of a house the right of opening his own wall, or a partition-wall, for receiving light on the side where his neighbour's tenement stands, with a right to hinder his neighbour from raising his building so high as to take away the said light.<sup>f</sup> And the other sort is of such services as give a right to hinder the neighbour from opening his own wall or a partition-wall, that he may have a window looking into a court, or other place; or which bound the liberty of making lights to lights that are without a prospect, or such others as happen to be settled by the title.<sup>g</sup>

### VI.

1044. *The Services for Prospects are of Two Sorts.*—The services for a prospect are likewise of two sorts. One is of those

<sup>c</sup> L. 1, D. de servit. præd. urb.

<sup>d</sup> L. 7, D. de servit.; — l. 2, D. de servit. præd. rust.; — l. 1, D. de cloac. This service is likewise for the use of lands. V. d. l. 2, D. de servit. præd. rust.

<sup>e</sup> L. 16, D. de servit. præd. urban.

<sup>f</sup> L. 4, D. de servit. præd. urb.

<sup>g</sup> L. 4, eod. See the second article of the first section, with the remark upon it.

which give the right of a free prospect, with power to hinder the adjacent building from being raised so as to take away the prospect. And the other is of such services as give the proprietor a right to hinder his neighbour from having either prospect or light on the side on which they join, or to oblige him to have it only such as is conformable to his title.<sup>a</sup>

## VII.

1045. *The Right of resting on another's Building.*—The right of resting a building on another's is a right to fix in our neighbour's wall a plank, a building, or other thing. And when it is a partition-wall, the joint proprietors have a right to rest any thing on it, every one on his own side; and the same wall serves reciprocally to two masters for two services. But whether the wall belong to one master alone, or be a partition-wall, they ought not to load it otherwise than is reasonable, and according as is regulated by the service.<sup>1</sup>

## VIII.

1046. *One cannot trespass on his Neighbour's Ground.*—Although a proprietor may do in his own ground whatever he pleases, yet he cannot make in it any work which may deprive his neighbour of the liberty of enjoying his own, or which may cause him any damage. Thus, the proprietor of a piece of ground, on which there is no building, cannot raise one whose roof may jut out on his neighbour's ground, and there discharge its waters. Thus, one cannot make a plantation, or a building, and other works, but at certain distances from the confines. Thus, one cannot make a stove, an oven, or any other work against even a partition-wall which may be in hazard of being damaged by it. And as for such sorts of works as may do hurt, and which cannot be made but at certain distances, or with other precautions, we ought, with regard to them, to observe the rules which custom and use have established.<sup>1</sup>

<sup>a</sup> E. 3, *D. de servit. præd. urban.*; — l. 15, *cod.*; — l. 2, *cod.*; — l. 40, *cod.*

<sup>1</sup> L. 2, *D. de servit. præd. urb.*; — l. 6, § 2, *D. si serv. vind.*; — l. 33, *D. de serv. præd. urb.*; — l. 14, § 1, *D. si serv. vind.*

<sup>2</sup> P. L. 11, *D. de serv. præd. urb.*; — l. 61, *D. de reg. jur.*; — l. 18, *D. de servit. præd. urb.*; — l. 19, *cod.*; — l. 13, *cod.*; — v. P. 8, § 5, l. 17, § 2, *D. si servit. vind.* See the following article, and the second article of the first section of the title *Of those who have Lands or Houses bordering upon one another.* There are customs which regulate the manner in which such works ought to be made, as are mentioned in this article.

of property in the ground. **IX.**

1047. *What one may do in his own Ground, to the Prejudice of his Neighbour.* — Although one ought not to make any work by which his neighbour's building may be damaged, yet every one has the liberty of doing in his own ground whatsoever he pleases, even although it should occasion to his neighbour some other sort of inconvenience. Thus, he who is not subject to any service may raise his house as high as he pleases, although by the said elevation he should darken the lights of his neighbour's house. For this kind of work alters nothing in the fabric of the other house; and he who is the master of the house ought to have placed his lights so as to be out of danger of this inconvenience, which he had no right to hinder, and which he might have easily foreseen.<sup>m</sup>

## X.

1048. *Inconveniences which the Neighbour ought or ought not to suffer.* — The works, or other things, which every one may make, or have in his own ground, and which send into the apartments of others who dwell in the same house, or into the neighbouring houses, a smoke or smells that are offensive, such as the works of tanners and dyers, and the other different inconveniences which one neighbour may cause to another, ought to be borne with, if the service of them is established.<sup>n</sup> And if there is no service settled, the inconvenience shall either be borne with, or hindered, according to the quality of the places and that of the inconvenience, and according as the rules of the civil policy, or the usage of the places, if there be any such, may have provided in the said matters.

## SECTION III.

### OF THE SERVICES OF LANDS.

#### ART. I.

1049. *Services of Lands.* — The services of lands, such as meadows, arable lands, vineyards, gardens, orchards, and others, are of

<sup>m</sup> L. 9, *D. de servit. prœd. urb.*; — l. 8, l. 9, *C. de servit.*; — v. l. 26, *D. de damn. inf.*  
See the ninth and tenth articles of the third section of the title of *Damages occasioned by Faults.* See the foregoing article.

<sup>n</sup> L. 8, § 5, *D. si servit. vind.*

several sorts, according to the several wants; such as a passage to go from one field to another, a right to draw water in another man's ground, an aqueduct, or others of the like nature.\*

## II.

1050. *Passage.*—The right of passage is a service which may be established different ways according to its title; either for the passage of a man on foot only, or for one on horseback, or for a beast loaded, or for a wagon.<sup>b</sup>

## III.

1051. *A Draught of Water.*—The draught of water is a right to take in a neighbour's ground water out of a spring or brook, to carry it into another ground, either at what time one pleases, or by intervals and at certain seasons, or constantly without intermission.<sup>c</sup>

## IV.

1052. *Aqueduct.*—An aqueduct is a conveyance of water from one ground to another, either in pipes under ground, or above ground.<sup>d</sup>

## V.

1053. *Other Sorts of Services.*—One may establish services of another nature, for divers uses. Such as the right of taking out of a neighbour's ground sand, stone, lime, for the use of another ground; of fetching water out of a neighbour's ground, and of gathering and depositing there the fruits of another ground, till they can be conveniently carried away at a certain season; of having in another man's ground a causeway along the banks of a river, a canal, a ditch, or any other work, with a right of free ingress and egress to the ground for repairing the work, and other different services, according to people's wants.<sup>e</sup>

\* L. 1, D. de servit. præd. rust.; — § 2, Inst. de serv.

<sup>b</sup> L. 1, D. de servit. præd. rust.

<sup>c</sup> L. 1, § 2, D. de aqua quot. et ust.; — d. l. § 3; — v. l. 2, § 2, D. de serv. præd. rust.

<sup>d</sup> L. 1, D. de servit. præd. rust.; — l. 11, § 1, D. comm. præd.

<sup>e</sup> L. 1, § 1, D. de serv. præd. rust.; — l. 5, § 1, cod.; — d. § et l. 6; — l. 3, § 1, cod.; — l. 23, § 1, cod.; — l. 1, § ult. D. de aqua et ay. pluvi. We see in the thirteenth section, l. 1, D. de comm. præd., an example of another kind of service, of a piece of ground which has in it a quarry, and out of which the proprietor is bound by some title or custom to let

## VI.

1054. *Services for the Use of Cattle.*—One may have likewise services for the use of cattle which are kept in a ground, either for watering them at a fountain in a neighbouring ground, or for depasturing them at certain seasons.<sup>f</sup>

## SECTION IV.

OF THE ENGAGEMENTS OF THE PROPRIETOR OF THE LAND OR TENEMENT WHICH OWES THE SERVICE.

## ART. I.

1055. *He ought to tolerate the Service.*—The proprietor of the land or tenement which serves is bound to suffer the use of the service, and to do nothing that may either hinder the said use, or diminish it, or render it inconvenient; and he ought to change nothing in the ancient condition of the places, nor in any thing else necessary to the service.<sup>a</sup>

## II.

1056. *He ought to tolerate the Works necessary for the Use of the Service.*—He ought likewise to suffer the works necessary for repairing and keeping in good condition the places, and other things destined for the service.<sup>b</sup> But he is not bound to repair the places at his own charge,<sup>c</sup> unless he be obliged to it by the title, or by a possession that is equivalent to a title.

## III.

1057. *What the Person is bound to whose Wall ought to bear the Building of another.*—He whose wall ought to bear the building

particular persons dig what stones they may have occasion for, they paying him a certain acknowledgment.

It is to be remarked on what is said in this article, of the service of gathering fruits and keeping them in another man's ground, that, without any particular right, all proprietors of grounds into which the fruits of neighbouring grounds may chance to fall, are obliged to suffer the owners to come and gather them. *Tit. D. de glande legenda.*

<sup>f</sup> *L. 1. § 1, D. de servit. præd. rust.; — l. 4, cod.; — l. 20, § 1, D. si serv. vind.; — l. 3, D. de serv. præd. rust.*

<sup>a</sup> *L. 1, C. de servit.; — l. 11, D. de servit. præd. urb.*

<sup>b</sup> See the seventh article of the first section.

<sup>c</sup> *L. 6, § 2, D. si servit. vind.* See the following article.

of another, or any other burden, is obliged to have it such as may be sufficient for bearing the burden; and he is bound likewise to maintain it in such condition, and to repair it if there be occasion.<sup>d</sup> Unless it were that the excess of the load had thrown it down, or damaged it. And in this case he who has overloaded it will be bound to lessen the burden, to repair the wall, and to make good the damages and loss which this overloading may have caused.<sup>e</sup>

## IV.

1058. *If it is necessary to repair a Partition-wall.* — If one of the proprietors of a partition-wall, upon which each of them may rest any thing on his own side, has made embellishments on it, such as painting, or carving, and the wall opens, or falls down, or the other proprietor is obliged to demolish it, in order to rebuild it such as it ought to be for the service, the two proprietors shall contribute equally to the charges necessary for restoring the wall to the condition in which it ought to be. But the loss of the embellishments will fall upon him who made them.<sup>f</sup>

## V.

1059. *Expenses for repairing a Wall that serves for supporting a Building.* — If it is necessary to rebuild a wall which serves for bearing a building, or supporting any thing belonging to another person, he who is owner of the wall, and who ought to maintain it in good condition, will be liable only for the charges necessary to repair the wall; and whatever is laid out either in demolishing that which rested on the wall, or in supporting it, will be borne by the person who had the right to rest the said thing on the wall.<sup>g</sup>

## VI.

1060. *The Proprietor of a Land or Tenement which serves may relinquish it.* — If the proprietor of a land or tenement which owes a service, or of a wall which is subject to bear the building of another person, chooses rather to abandon his right of property, than to make the repairs which his service obliges him to, he shall

<sup>d</sup> L. 6, § 2, D. de servit. vind.; — l. 8, eod.; — l. 33, D. de servit. prœd. urb.

<sup>e</sup> L. 14, § 1, D. si servit. vind.

<sup>f</sup> L. 13, § 1, D. de servit. prœd. urb. See the fifth article of the fifth section of *Damages occasioned by Faults.*

<sup>g</sup> L. 8, D. si servit. vind.

be discharged from them by relinquishing the land or tenement. For it was the land or tenement that was bound to serve; and not the person.<sup>a</sup>

## VII.

1061. *If the Estate to which the Service is due be divided.*— If an estate to which a right of passage is due be divided among several proprietors, the service will be preserved to each portion, for it was due to every individual part of the estate. But the proprietor of the ground which owes the service of the passage will be bound to give it only in the same place for all the proprietors, and they cannot use the service but by agreeing among themselves so as not to enter into the ground which owes the service but at the place where the service was established.<sup>b</sup>

## VIII.

1062. *When two Services are due from one Tenement to another.*— If a tenement is subject to two services, as, for instance, a house which cannot be raised higher to the prejudice of the prospect of a neighbouring house, and which is also bound to receive the water that comes from it, and if the proprietor of the house which serves happens to purchase the liberty of one of the two services, without making any mention of the other; as if he purchases the liberty to raise his building higher, and to take away his neighbour's prospect, he cannot extend the said liberty to the prejudice of the second service, which still subsists, and he must raise his building no higher than that it may still be capable of receiving the water that falls from the neighbouring house.<sup>c</sup>

## SECTION V.

OF THE ENGAGEMENTS OF THE PROPRIETOR OF THE LAND OR TENEMENT FOR WHICH A SERVICE IS DUE.

### ART. I.

1063. *He who has a Right of Service can innovate nothing.*— The proprietor of the land or tenement to which a service is due

<sup>a</sup> L. 6, § 2, *D. si serv. vind.*

<sup>b</sup> L. 23, § ult. *D. de serv. præd. rust.* See the eighteenth article of the first section.

<sup>c</sup> L. 21, *D. de servit. præd. urb.*; — v. l. 20, *D. de servit. præd. rust.*

cannot use it but according to his title, without innovating any thing, either in the land or tenement which owes the service, or in his own to which the service is due, that may make the condition of the service harder. Thus, he cannot overload a wall, enlarge a passage, advance the eaves of a house whose waters his neighbour is bound to receive, nor make any other changes of the like nature which may increase the service, or render it more inconvenient; and he can only lessen it or make it easier.<sup>a</sup>

## II.

1064. *The Overloading of a Wall that serves.*—If he who has a right to rest any thing on the wall of another, or on a wall belonging to him in common with another, shoves the wall forward, or overloads it in such a manner that the wall which was sufficient for the service is by that means thrown down or damaged, he shall be liable for all the damage that happens thereby.<sup>b</sup>

## III.

1065. *Repairs for the Use of the Service.*—He to whom a service is due ought to make the repairs necessary for using it, such as the repair of the way of his passage, of his aqueduct, and others of the like nature.<sup>c</sup>

## IV.

1066. *Of the Damage which is a Natural Consequence of the Service.*—If the land or tenement which serves suffers any damage by a natural consequence of the service, as if a piece of ground is overflowed by a torrent, which has been occasioned by the service of a conveyance of water from thence; if the roof of a house is damaged by the fall of an extraordinary quantity of rain, which comes from the roof of the neighbouring house whose waters it was bound to receive; he to whom the service is due will not be accountable for such sort of damages. But if he had made any change in the condition of the places, contrary to the title of his service, and the said change had been the occasion of the damage, he would be bound to make it good.<sup>d</sup>

<sup>a</sup> L. 20, § 5, *inf.* D. de servit. præd. urbans; — l. 11, *cod.*; — l. 1, C. de servit.; — l. 14, D. si servit. vind.; — d. l. 14, § 1; — l. 20, § 5, D. de servit. præd. urb.

<sup>b</sup> L. 40, § 1, D. de dam. inf.

<sup>c</sup> L. 6, § 2, D. si servit. vind. See the second and third articles of the fourth section.

<sup>d</sup> L. 20, § 1, D. de servit. præd. rust.; — l. 1, § 14, D. de aqua et aquæ plus. arc.



## V.

1067. *The Right of Service is not to be extended beyond its Bounds, nor can it be communicated to others.*—He to whom any service is due not only cannot communicate the use of it to any other, but he may not even extend it for his own use beyond what is given him by the title. Thus, he who has a draught of water for a particular ground cannot use it for his other grounds; and if the draught of water be only for one part of a ground, he can use it only for that part.\*

## SECTION VI.

## HOW SERVICES COME TO CEASE.

## ART. I.

1068. *The Right of Service perishes with the Land or Tenement.*—The service ceases when the thing comes to be in such a condition that there is no using it; as if the land or tenement which owes the service, or that for whose behoof it was established, happens to perish; and it would be the same thing if, the land or tenement subsisting, the cause for which the service was established should chance to cease. Thus, for example, if a spring from whence the neighbour has a right to fetch water happens to be dried up, he would lose the right of entering into the ground where the spring was. But if the spring should chance to flow again, even after the time appointed for prescription, the service would be reestablished; and nothing could be imputed to the person for whom the service was due for not having used it during the time that he could not have its use.\*

## II.

1069. *Confusion of the Property of the two Lands or Tenements.*—Services cease, likewise, when the master of the land or tenement that serves, or he that is master of the land or tenement for which the service was established, becomes proprietor of both. For a service is a right on the estate of another person; and the

\* L. 24, D. de servit. præd. rust.;—l. 33, § 1, cod. See the fourteenth article of the first section.

\* L. 34, in f. of l. 35, D. de servit. præd. rust. See the fourth article of this section, and the remark made upon it.

right which the master has over his own estate is not called a service.<sup>b</sup>

### III.

1070. *If after this Confusion the Proprietor sells again the Land or Tenement which served.* — If the proprietor of the land or tenement for which the service was established acquires the property of the land or tenement which serves, and afterwards sells it again without reserving the service, it is sold free. For the service was annulled by the rule explained in the foregoing article: and it is not reestablished to the prejudice of the new purchaser, on whom this charge was not imposed.<sup>c</sup>

### IV.

1071. *When a Land or Tenement, that is between two other Lands or Tenements, hinders the Use of the Service.* — If between the land or tenement that serves, and that to which the service is due, there be another land or tenement, which hinders the use of the service, the service is suspended whilst the said obstacle remains. Thus, for example, if between two houses, one of which cannot be raised so high as to prejudice the prospect of the other, there stands a third house, which, not being liable to the said service, has been raised, and does obstruct the said prospect, the proprietor of the house which owes the service may raise his. Thus, he who had a right of passage loses the use of his service, if between his ground and that which serves there be another ground which is not bound to grant the passage, and so by that means makes his right of passage useless. But if these obstacles chance to be removed, as if the house standing between the two be demolished, or if a passage be acquired through the ground which separated the other two, he to whom the service was due recovers the use of it.<sup>d</sup>

<sup>b</sup> L. 1, D. *quemad. serv. am.*; — L. 10, D. *com. prad.*; — L. 26, D. *de servit. prad. urb.*

<sup>c</sup> L. 30, D. *de servit.*

<sup>d</sup> Si forte qui medius est, quia servitutem non debebat, altius extulerit ædificia sua ut jam ego non videar luminibus tuis obstiturus, si ædificavero: frustra intendes, jus mihi non esse ita ædificatum habere, invito te; sed si intra tempus statutum, rursus deposuerit ædificium suum vicinus, renascetur tibi vindictio. L. 6, D. *si serv. vind.* In rusticis prædiis impedit servitutem medium prædium, quod non servit. L. 7, § 1, D. *de serv. prad. rust.*

We have not set down in this article that which the words of the law, *intra statutum tempus*, seem to imply, viz. that this right does not revive but when there is no prescription. For we see, on the contrary, by the laws cited on the first article of this section,

## V.

1072. *Prescription of Services.*—Services are lost by prescription; or they are reduced to so much as is retained of them by possession during the time sufficient for prescription.\*

## VI.

1073. *Different Ways of Prescribing, according to the Differences of Services.*—The services which consist in some action on the part of those to whom they are due, are lost by prescription, when the persons to whom the services are due cease to make use of them. As a passage, and a draught of water, which are lost by prescription, when the persons to whom they are due cease to pass, or to draw water. But the services which consist barely in fixing the state of the places in which no innovation is to be made, such as a service of not raising a building higher to hinder a prospect, a discharge of the water from off a neighbouring house, are never lost by prescription, except when there is a change of the state of the places which annuls the service, and which lasts during the time limited for prescription; as if the proprietor of a house which is subject to a service, having raised it higher, has

that prescription ought not to run against him who could not use the service. *Quod jus non negligentia, aut culpa sua amiserat, sed quia ducere non poterat.* And although that be not the same case with this of the fourth article, yet there may be circumstances in the cases comprehended in it which may make it reasonable that the service should be preserved against prescription. Thus, for example, if the possessor of three houses, keeping one of them to himself, has sold that in the middle, and given away the third, imposing on the buyer and on the donee the service of not raising their houses higher; and it happens that the purchaser of the house in the middle is evicted of it by a third person, who, not being bound to the service, raises the said house higher; it is true that the donee in this case may likewise raise his; but if the donor should come to regain possession of the house which he had sold, although after the time limited for prescription were elapsed, and he should have a mind to take possession again of his service, his donee being still in possession of the house that was subject to the service, could he insist on prescription against his title? But if this donee had sold the house to a third person who was ignorant of the service, and who had prescribed against it, would it be just in regard to him to interrupt the prescription? So that these sorts of questions may depend on the circumstances. And even in the case of the first article of this section, if we suppose that the ground which owed the service was possessed by a third purchaser, who knew nothing of the service of a draught of water, and who had possessed the ground during the time required for prescription, the person to whom the service was due never having entered any protestation for saving his right, ought it to revive against this third possessor after so long a time? And might not we impute to the person who should claim the service his neglect in not taking the precautions necessary for preserving his right.

\* L. 10, § 1, *D. quemadm. serv. amit.*; — l. 13, *C. de serv.* See the eleventh and thirteenth articles of the first section.

continued in possession of this change, or if the waters have been discharged another way.<sup>f</sup>

## VII.

1074. *Prescription of Services, whose Use is not perpetual, but interrupted by Intervals of Time.* — If the use of a service is not perpetual, but by intervals of some years, such as a service of a passage for going to a copse, which one uses only at the time they cut down the wood, either once in five years, or every ten years, or after any other long interval of time, and only during the time necessary for cutting down and transporting the wood; the prescription against such a service is not acquired in the ordinary time of ten years, in the places where the time for prescription is limited to ten years; but the time ought to be fixed either to twenty years, or to more or fewer, according to the time limited for prescription in the places, and by the customs observed therein, if there are any, and according to the quality and intervals of the service, and other circumstances.<sup>g</sup>

## VIII.

1075. *Continuation of Prescription from one Possessor to another.* — If a right of service passes from one proprietor to another, the time of prescription which had run against the first proprietor is joined to the time which has run against the second, and prescription is acquired against him by these two times joined together.<sup>h</sup> As, on the contrary, a second possessor acquires a service by the possession of his predecessor joined to his own.

## IX.

1076. *When an Estate is sold by a Decree of Court, the Services nevertheless continue.* — If the estate which owes the service is sold by a decree of court, the service is nevertheless preserved; for it is sold in the condition it is in. And much more is the service preserved, if it is the estate to which the service is due that is decreed to be sold.<sup>i</sup>

<sup>f</sup> L. 6, D. de servit. præd. urb.; — l. 6, § 1, quemad. serv. am.

<sup>g</sup> L. 7, D. quemad. servit. amit.; — l. ult. C. de servit.

<sup>h</sup> L. 18, § 1, D. quemad. servit. qm.

<sup>i</sup> L. 20, § 2, D. de servit. præd. rust.

## TITLE XIII.

## OF TRANSACTIONS.

1077. *Use of Transactions.*—There are two sorts of ways for terminating by mutual consent lawsuits, or for preventing them. The first is the way of an agreement between the parties, who settle either by themselves or by the counsel and assistance of their friends, the conditions of an agreement, and who submit themselves to the said conditions by a treaty; and this is what is called a *transaction*. The second is the award of arbitrators, to whom the parties refer their differences by a *compromise*. So that transactions and compromises are two kinds of covenants, the first of which shall be the subject-matter of the present title; and that of compromises shall be explained in the following title.

## SECTION I.

## OF THE NATURE AND EFFECT OF TRANSACTIONS.

## ART. I.

1078. *The Definition.*—A transaction is an agreement between two or more persons, who, for preventing or ending a lawsuit, adjust their differences by mutual consent, in the manner which they agree on; and which every one of them prefers to the hopes of gaining, joined with the danger of losing.\*

## II.

1079. *Divers Ways of transacting.*—Transactions put an end to, or prevent, lawsuits in several ways, according to the nature of the differences, and the divers agreements which settle them. Thus, he who had some pretension either desists from it altogether by a transaction, or obtains a part of what he claims, or even the whole. Thus, he of whom a demand is made of a sum of money either pays it, or gives his bond for it, or is discharged either of the whole or of a part of it. Thus, he who was in dispute about a warranty, a service, or any other right, either subjects himself to

\* L. 1, *D. de trans.*; — l. 2, *C. cod.*; — l. ult. *C. cod.*; — l. 14, *D. cod.*

it, or frees himself from it. Thus, he who complained of a sentence either gets it to be reformed, or acquiesces under it.\* And, in fine, the parties transact on the conditions to which they are willing to agree, according to the general rules of contracts.<sup>b</sup>

## III.

1080. *Transactions are limited to their Subject-Matter.*—Transactions regulate only the differences which appear clearly to be comprehended in them by the intention of the parties, whether it be explained by a general or particular expression; or it be known by a necessary consequence of what is expressed; and they do not extend to differences which the parties never intended to comprehend in them.<sup>c</sup>

## IV.

1081. *A Transaction with one of the Parties interested is of no Prejudice to the others.*—If he who had, or might have had, a difference with several persons, transacts with one of them for what concerns him in particular, the transaction will be no hindrance why his right should not subsist against the others; and why he may not either sue them at law, or transact with them in another manner. Thus he to whom two tutors are accountable for one and the same administration may transact with one of them for his part, and sue the other. Thus, the creditor of a person deceased, or the legatee, may transact his claim with one of two heirs, or executors, for his portion, and sue the other coheir, or co-executor, for what falls to his share to pay.<sup>d</sup>

## V.

1082. *A Transaction with another than the Adversary.*—If he who has a difference transacts it with one whom he believes to be his adverse party, but is not, the said transaction will have no effect. Thus, for instance, if a creditor to an inheritance transacts with one whom he took to be heir, but who was not, this

<sup>b</sup> L. 38, C. de trans.; — l. 6, cod.; — l. 20, cod. toto tit. D. et C. de trans. What is said in the thirty-eighth law, C. de trans., that it is no transaction where one does not give, or promise, or keep something, ought not to be taken in the strict literal sense. For one may transact without either giving, or promising, or retaining any thing. Thus, he who is sued as surety for another may be discharged of this suit, although there be nothing either given, or promised, or retained, on either side.

<sup>c</sup> L. 9, § 1, D. de trans.; — d. l. § 3; — d. l. in fine; — l. 5, cod.

<sup>d</sup> L. 1, C. de trans.; — l. 15, D. de tut. et rat. distr.

transaction will be without effect, both with regard to the creditor, and also with regard to the true heir.<sup>a</sup> For the true heir could not be bound by the deed of another person; and the creditor was under no obligation on his part to the heir, with whom he did not treat, and for whom he might perhaps have less consideration than for the person whom he took to be heir.

## VI.

1083. *A Transaction concerning one Right is of no Prejudice to another Right of the like Nature, which accrues afterwards.* — If he who had transacted concerning a right which he had in his own person, acquires afterwards a like right which belonged to another, the transaction would be of no prejudice to this second right. Thus, for example, if one come to full age has transacted with his tutor for the account of the share of his father's estate that fell to him, and he succeeds afterwards to his brother, to whom the same tutor was likewise accountable for his share of his father's estate, this transaction will not hinder the same questions which it had adjusted as to one portion from subsisting with regard to the other; and this second right remains whole and entire.<sup>f</sup>

## VII.

1084. *A Transaction with the Stipulation of a Penalty.* — We may add to a transaction the stipulation of a penalty against the party who fails to perform it. And in this case the non-performance of what has been agreed on gives a right to exact the penalty, according as the agreement has been made, and pursuant to the rules explained in the title of *Covenants*.<sup>g</sup>

## VIII.

1085. *Transaction with the Surety.* — The creditor who transacts with the surety of his debtor may discharge only the surety, and the transaction will be of no prejudice to him, with regard to the debtor. But if it is with the debtor himself that he has transacted, the surety will likewise have the benefit of the transaction, because his obligation is only an accessory to that of the principal debtor.<sup>h</sup>

<sup>a</sup> L. 3, § 2, *D. de trans.*

<sup>f</sup> L. 9, *D. de trans.*

<sup>g</sup> L. 37, *C. de trans.*; — l. 16, *D. eod.* See the fourth and fifth articles of the third section of *Covenants*.

<sup>h</sup> L. 7, § 1, *D. de trans.*

## IX.

1086. *Transactions have the Force of Judgments.* — Transactions have a force equal to the authority of things adjudged, because they are in the place of a judgment, which is so much the stronger because the parties have consented to it; and because the engagement which delivers the parties from a lawsuit is altogether favorable.<sup>a</sup>

## SECTION II.

## OF THE DISSOLUTION OF TRANSACTIONS, AND OF NULLITIES IN THEM.

## ART. I.

1087. *Fraud in a Transaction makes it Null.* — The transactions in which one of the parties contracting has been engaged by the fraud of the other have no effect. Thus, he who by a transaction relinquishes a right which he was not able to maintain, for want of a title which his adversary concealed, would be restored to his right if the truth should come to light. And it would be the same thing with an heir who had transacted with his coheir, who had fraudulently concealed from him the true state of the inheritance.<sup>a</sup>

## II.

1088. *Error has the same Effect.* — If he who had acquired a right by a testament which he knew nothing of, derogates from this right by a transaction with the executor, the said transaction will be without effect, when the testament comes to appear; and that even although the executor had known nothing of it. Thus, for example, if the debtor to an estate transacts, and pays a debt which had been remitted by the testament; if a legatee or a trustee transacts about a right which was regulated by a codicil; they may get the transaction to be repealed. For the testament, or the codicil, was a title common to the parties, and it ought not to lose its effect by a transaction which was only a consequence of the ignorance of this truth.<sup>b</sup>

<sup>a</sup> L. 20, C. de trans.; — l. 2, C. eod.; — l. 65, § 1, D. de cond. ind.

<sup>b</sup> L. 19, C. de trans.; — l. 9, § 2, D. eod.; — v. l. 65, § 1, D. de cond. ind.

<sup>c</sup> L. 3, § 1, D. de trans.; — l. 12, in fine eod.; — l. 6, eod.



## III.

1089. *If the Transaction derogates from a Right of which the Title is unknown.* — If he who by a transaction derogates from a right fallen to him by a title which he knew nothing of, but which was not concealed from him by his adverse party, comes afterwards to recover the said title, the transaction may either subsist, or be annulled, according to the circumstances. Thus, in the case of the foregoing article it is annulled. Thus, on the contrary, if it was a general transaction concerning all the affairs which the parties might have with one another, the writings newly discovered relating to one of the differences, which neither of the parties knew any thing of, would not change any thing in the transaction, the intention of the parties having been to compensate, and to extinguish all sorts of pretensions.\*

## IV.

1090. *When a Transaction is founded on Forged Writings.* — If a transaction has been grounded on forged writings, which passed for true ones, and the forgery be discovered afterwards, he who complains of it may procure the transaction to be annulled, in all that has been regulated on that foundation. But if the transaction contained other points, which had no dependence on the forged writings, they would subsist. And there would be no other changes made, except such as should be occasioned by the discovery of the truth which had remained in the dark because of the forged writings.<sup>d</sup>

## V.

1091. *Of Damage suffered by Transactions.* — Transactions are not annulled by the damage which one of the contracting parties suffers, in giving more than he really owes, or in receiving less than what is due to him, unless there were some fraud in the transaction.<sup>e</sup> For these sorts of losses are compensated with the advantage of putting an end to a lawsuit, and preventing the uncertainty of the event. And it is for the public good, not to annul transactions on pretence of damages suffered by one of the parties; which practice would soon grow too common, and would multiply lawsuits.\*

\* L. 29, C. de trans.; — L. 19, cod.; — v. L. 31, D. de iurejur.; — L. 1, C. de reb. cred. et iurejur.

<sup>d</sup> L. pen. C. de trans.; — v. tit. C. si ex fals. instr.

<sup>e</sup> Hæres ejus, qui post mortem suam rogatus erat universam hæreditatem restituere

## VI.

1092. *A Transaction made to color an Unlawful Contract.* — The transactions which are made only to color an illegal act, and to make another kind of contract which is prohibited by some law, to pass under the name and appearance of a transaction, are null. Thus, for instance, if those who are intrusted with the administration of the affairs of a town treat with one of its debtors, who by his interest with them obtains a discharge, under the color of a feigned transaction, the said transaction will be annulled. And it would be the same thing in case of a deed of gift made, under color of a transaction, in favor of a person to whom one could not give legally.<sup>1</sup>

## VII.

1093. *A Transaction concerning a Lawsuit, in which Judgment has been given, although the Parties know nothing of it.* — If after judgment has been given in a lawsuit, without the knowledge of the parties, they agree it by a transaction, the transaction will subsist, if there lies an appeal from the sentence. For since the lawsuit may still be continued, the event remains uncertain. But if there lies no appeal from the sentence, as if the matter has been decided by a final judgment from which there lies no appeal, the transaction would be null. For there was no longer any lawsuit depending, and the parties transacted only because they presupposed that the matter in dispute was not decided, and that neither of them had acquired his right. So that this error, together with the authority of things adjudged, makes that which has been judicially determined to be preferred to a consent, which he who has desisted from his right would not have given, had it not been that he believed himself to be in a danger in which he was not.<sup>2</sup>

*minimam quantitatem, quam solum in bonis fuisse dicebat, his, quibus fideicommissum debebatur, restituit. Postea, repertis instrumentis, apparuit, quadruplo amplius in hereditate fuisse; quaesitum est, an in reliquum, fideicommissi nomine, conveniri possit? respondit, secundum ea quae proponerentur, si non transactum esset, posse. L. 78, § ult. D. ad Tytull.* We must not extend this law so far as to take it in a sense contrary to what has been said in the first article. For if this heir or executor had been guilty of any fraud, he could not take any advantage of the transaction.

By the ordinance of Charles IX. of 1560, damage alone, without fraud or force, is not sufficient to dissolve transactions.<sup>3</sup>

<sup>1</sup> L. 12, C. de trans. ; — v. l. 5, § 5, D. de donat. ist. vir. et ux.

<sup>2</sup> L. 11, D. de transact. ; — l. 7, D. eod. ; — l. 32, C. de trans. ; — l. 22, § 1, D. de cond. ind. ; — d. § in fine.

## TITLE XIV.

## OF COMPROMISES.

1094. *The Use of Compromises.* — Although there be judges appointed for deciding all differences, and one of the contending parties cannot oblige the other to plead before any other judge; yet it is natural that it should be free for the two parties to agree to make choice of other persons to be their judges. And those who, being desirous to make up their differences, cannot agree among themselves as to the conditions of their accommodation, may refer the matter to arbitrators, who are so called because the persons who choose them give them power to arbitrate, and to regulate what shall seem just and reasonable to them, for terminating the differences of which they are made judges.

1095. The covenant by which arbitrators are named is called a compromise, because they who name the arbitrators promise reciprocally to one another to execute whatever shall be arbitrated; and the judgment pronounced by the arbitrators is called an award.

1096. *The Authority of Awards.* — The authority of awards is founded on the will of those who have named the arbitrators. For it is this will which engages those that make the reference to execute what shall be arbitrated by the persons whom they have chosen to be their judges. But because the effect of sentences

We must not confound the arbitrators named by compromise, of which mention is made in this title, with third persons to whom it is referred to make an estimate of any thing. See the eleventh article of the third section of *Covenants*, and the eleventh article of the second section of *Partnership*. Arbitrorum genere sunt duo. Unum ejusmodi, ut sive æquum sit, sive iniquum, parere debemus: quod observatur, cum ex compromisso ad arbitrium sum est. Alterum ejusmodi, ut ad boni viri arbitrium redigi debeat, nec nominatim persona sit comprehensa, cujus arbitrata fiat. *L. 76. De pro socio.*

By the ordinance of *Francis II.* in the year 1560. ratified by that of *Moulins*, art. 83, the parties who are at variance together about the partition of an estate fallen to the next of kin, about making up the accounts of a guardianship, and other administrations, restitution of a dowry, and joissance, are obliged to name for arbitrators relations, friends, neighbours; and if any of the parties should refuse to do it, they are to be compelled by the judge.

This ordinance of 1560 enjoined the same thing among merchants, who report as differences in relation to their traffic. It is by virtue of the same ordinance, that appeals from the awards of arbitrators lie to the sovereign courts. By the ordinance of 1673, in the title of *Partnerships*, art. 9, and the following articles, the copartners are obliged to submit their differences to the decision of arbitrators.

pronounced by arbitrators cannot be the same with that of sentences pronounced by judges, who have authority to judge, and to put their judgments in execution; and because also the parties who choose arbitrators do not divest themselves of the right of getting that which has been wrongfully arbitrated to be reformed; the persons therefore who make the reference do not oblige themselves absolutely to execute what shall be awarded; but they only engage themselves either to abide by the award, or to a certain penalty which the contravener shall be bound to pay to the other.

1097. *Time given to the Arbitrators to pronounce their Award.* — It is usual, and even necessary, in compromises, to fix a time within which the arbitrators shall pronounce their award. For, on the one hand, a delay is necessary, for instructing the arbitrators, and putting the things in a condition of being determined; and, on the other hand, this time ought to be limited, because it would not be just that it should be in the power either of the arbitrators or parties to put off the final decision for ever. So that the power of arbitrators determines at the time limited by the compromise.

## SECTION I.

### OF THE NATURE OF COMPROMISES, AND OF THEIR EFFECT.

#### ART. I.

1098. *Definition of a Compromise.* — A compromise is a covenant by which persons who have a lawsuit, or difference with one another, name arbitrators to decide the matter; and oblige themselves reciprocally, either to perform what shall be arbitrated, or to undergo a certain penalty of a sum of money, which the person who shall contravene the award shall be bound to pay to the other, who is willing to stand to it.\*

#### II.

1099. *The Manner of proceeding in Compromise.* — The parties who have put their differences in compromise declare their pretensions, and prove them, as the method is in a court of justice, by producing writings and evidences, observing in this the order

\* L. 44, D. de recept.; — l. 2, cod.

which they agree on by mutual consent, or which is regulated by the arbitrators.<sup>b</sup>

### III.

1100. *The Compromise obliges only to the Penalty.* — The effect of the compromise is to oblige him who shall refuse to perform the award to pay the penalty.<sup>c</sup>

### IV.

1101. *A Compromise is either General or Particular.* — We may compromise either in general all differences, or only some of them in particular. And the power of the arbitrators is limited to what is explained in the compromise.<sup>d</sup>

### V.

1102. *The Compromise ends when the Time limited for it expires.* — The compromise, and the power which it gives to arbitrators, ends when the time which it prescribed is expired, although the award has not been pronounced.<sup>e</sup>

### VI.

1103. *If the Compromise is at an End by the Death of one of the Parties.* — The compromise expires likewise by the death of one of the parties, and does not oblige the survivor to the heirs or executors of the other, nor those heirs or executors to the survivor; unless it has been otherwise settled by the compromise.<sup>f</sup>

### VII.

1104. *One cannot compromise Accusations of Crimes.* — Arbitrators having no other power than that which the parties can give them, we cannot put to arbitration certain causes which the laws and good manners do not suffer to be exposed to any other event besides that which the natural authority of justice gives them, and which we cannot bring before other judges than those who are clothed with public authority. Thus we cannot compromise accusations of crimes, such as murder, robbery, sacrilege, adultery,

<sup>b</sup> L. 1, D. de recept. — L. 14, § 1, C. de jud.

<sup>c</sup> L. 2, D. de recept.

<sup>d</sup> L. 21, § 6, D. de recept.

<sup>e</sup> L. 1, C. de recept.

<sup>f</sup> L. 27, § 1, D. de recept. The engagement of the compromise may have its motive the consideration which one of the parties may chance to have for the other; which consideration does not pass to their heirs or executors.

forgery, and others of the like nature. For, on the one side, the public interest is concerned in these sorts of causes, which makes the king's advocate, or attorney-general, a party in them, whose function is to sue for vengeance of a public crime, without regard to what passes between the parties: and, on the other side, the party accused can neither defend his honor, nor his innocence, which is attacked in public, but in public, and before the judges who exercise the ministry of justice: and it would be contrary to good manners, and, moreover, useless for him to submit voluntarily to justify his innocency before arbitrators, who, having no share in the administration of justice, could neither justify nor condemn him.

## VIII.

1105. *Nor a Cause in which the State or Honor of a Person is concerned.* — Neither can we compromise causes which relate to the state of persons.<sup>a</sup> As if the question were to know whether one is legitimate or a bastard, whether one is a professed monk or not, whether a gentleman or a plebeian. Nor can such causes be put to arbitration, the consequence whereof may interest our honor or dignity in such a sort, that good manners do not allow us to compromise their event, nor to choose judges for deciding them.

## SECTION. II.

OF THE POWER AND ENGAGEMENT OF ARBITRATORS; AND WHO MAY BE AN ARBITRATOR, AND WHO NOT.

## ART. I.

1106. *The Arbitrators ought to give their Award within the Time limited by the Compromise.* — The arbitrators ought to give their award within the time limited by the compromise, and it would be well if it were given after the said time is expired. For their power is then at an end, and they are no longer arbitrators.

<sup>a</sup> B. 32, § 10. *De de recept.* See the following article.

<sup>a</sup> B. 32, § 7. *De de recept.* — *l. ubi. C. ubi caus. ant. agi debet.*

<sup>a</sup> L. 1, C. de recept.

## II.

1107. *Power to the Arbitrators to prorogue the Time.*—The parties may give power to the arbitrators to prolong the time; and in this case their power lasts during the time of the prorogation.<sup>3</sup>

## III.

1108. *Delay for instructing the Cause.*—If the compromise regulates a certain time for instructing the cause which the arbitrators are to decide, they cannot give their award till the said time is expired.<sup>6</sup>

## IV.

1109. *Arbitrators cannot change their Award.*—The arbitrators, having once given their award, they cannot retract it, nor change any thing in it. For the compromise was only to give them power to give an award, and when that is done their power is at an end. But their power is not at an end by an interlocutory sentence, or an incident in the cause, and they may give different interlocutory sentences on such incidents as often as occasion requires.<sup>4</sup>

## V.

1110. *Arbitrators cannot judge, unless they are all together.*—If there are several arbitrators named by the compromise, they cannot give their award unless they all see the process, and give judgment of it together. And although the greater part had given the award in the absence of one who was named with the others, yet the award would be null, because the absent person ought to have been one of the judges, and had he been present, he might have been able by his reasoning to bring the other arbitrators over to his opinion.<sup>5</sup>

## VI.

1111. *The Power of the Arbitrators is regulated by the Compromise.*—The arbitrators can judge of nothing else besides that which is submitted to their judgment by the compromise, and they

<sup>3</sup> L. 25, § 1, D. de recept.; — L. 32, § ult. cod.; — L. 33, cod.

<sup>4</sup> L. 33, D. de recept.

<sup>5</sup> L. 30, D. de recept.; — L. 19, § ult. cod.

<sup>6</sup> L. 17, § 2, D. de recept.; — d. f. 17, § ult. et l. 18, cod.

must observe the conditions which are there prescribed; and if they judge otherwise, their award is null.<sup>c</sup>

## VII.

1112. *Who may be Arbitrators, and who not.*—All persons may be arbitrators, except such as are under some incapacity or infirmity which renders them unfit for that function.<sup>d</sup>

## VIII.

1113. *Women cannot be Arbitrators.*—Women, who because of their sex cannot be judges, are likewise incapable of being named arbitrators by a compromise,<sup>e</sup> although they may exercise the function of skilful persons, as to things within their knowledge, in any art or profession in which they are skilled. For this function is not of the same quality with that of a judge.

# TITLE XV.

## OF PROXIES, MANDATES, AND COMMISSIONS.

1114. *The Origin and Use of Proxies, Mandates, and Commissions.*—Absence, indisposition, and many other impediments, do often hinder persons from looking after their own affairs, and in these cases he who cannot act himself chooses a person whom he empowers to do what he would do himself if he were present.

1115. Thus, those who have any affair to be transacted, and cannot be present themselves, such as a sale, a partnership, a transaction, or other affairs of all kinds, give a power to other persons to treat for them. And he to whom this power is given is called a *proxy*, or *attorney*, he being constituted to take care of the interest, and to procure the advantage of the person who has employed him.

1116. Thus, they whose dignity, or great employments hinder them from looking after their domestic concerns choose persons to whom they give power to take care of them; and those persons are called either *comptrollers*, *stewards*, or by other names, accord-

<sup>c</sup> L. 32, § 15, D. de recept.

<sup>d</sup> L. 9, § 1, D. de recept.

<sup>e</sup> L. ult. C. de recept.



ing to the quality of the persons who employ them, and the affairs committed to their charge.

1117. Thus, they who have offices or employments, of which the functions may be performed by others than themselves, such as receivers, farmers of the king's revenue, and many others, employ in the execution of these offices deputies and clerks.

1118. Thus, they who deal in any commerce by land or sea, whether by themselves or in partnership with others, have likewise their factors and agents to manage the particular concerns of their business, which they themselves have not leisure to look after.

1119. *What is common to Proxies and Commissions.* — All these ways of deputing other persons in the place of the masters have this in common to them; that those who commit to others the care of their affairs, and those who charge themselves with them, enter into covenant with one another, by which the master, on his part, regulates the power which he gives to him whom he constitutes his proxy, or whom he appoints his agent, for his particular affairs, or for the business of his office; and he who charges himself with the business accepts, on his part, of the power and charge intrusted to him; and both the one and the other enter into the engagements which follow from the said covenant.

1120. *The Subject-Matter of this Title.* — It is this kind of covenant and these engagements that shall be the subject-matter of this title. And seeing the rules concerning proxies, or letters of attorney, are almost all of them common to commissions, and to other the like ways of deputing one person in the room of another, it will be easy to apply to every one of them what shall be said of proxies.

1121. *Mandates.* — We have inserted in the title the word *mandates*, because it is the word used in the Roman law to express proxies; and likewise in our language it signifies a manner of giving some order, as he does who by a note in writing orders his debtor, or his agent, to give or pay a sum of money, or any other thing, to some person. The mandate, in this sense, is a kind of covenant, of the like nature with these treated of in this title. For the creditor, for example, who requires his debtor to pay to another, obliges himself to discharge the debtor of what he shall have paid by virtue of this order. And the debtor who on his part accepts of the order, obliges himself to his creditor to execute it.

1122. It is to be remarked as to the word *mandate*, that it had also in the Roman law other meanings, to signify other sorts of covenants, which have relation to these mentioned in this title. Thus, they gave the name of mandate to the transaction between a debtor and the person who becomes his surety; because the debtor was considered as requiring or praying his surety to engage for him. Thus, they expressed by the same name the agreement between a person who transferred a debt and him who accepted it, considering the transferrer as giving order to his debtor to pay the debt to another, and the person accepting the transfer as being vested with the right of the transferrer to receive that which is transferred to him.

1123. But seeing this matter of transfers does not properly belong to this place, and that it has been treated of in the contract of sale, of which the assignments of rights is a kind, and that the matter of sureties is also of another nature, and belongs to another place; we shall not take in these matters under this title.

1124. We shall not say any thing here of proctors, or attorneys at law, for managing lawsuits, they being officers who have their functions regulated, the greatest part whereof do not depend on the will of the persons who constitute them, but on the rules and practices of the respective courts of justice, which is a matter that does not come within the design of this treatise. And as to their functions, in which they ought to follow the directions of their clients, we may apply to them the rules which shall be explained in this title.

## SECTION I.

### OF THE NATURE OF PROXIES, MANDATES, AND COMMISSIONS.

#### ART. I.

1125. *Definition of a Procuration, or Letter of Attorney.*—A procuration, or letter of attorney, is an instrument, by which he who is not at leisure to look after his own concerns gives power to another to do it for him, as if he himself were present. Whether it be that he is barely to manage and take care of some estate, or some affair, or that he is to treat in his name with others.

## II.

1126. *Definition of a Proxy.*—A proxy is the person who does the business of another, having a power from him.<sup>b</sup>

## III.

1127. *How the Covenant is formed between the Person who appoints a Proxy and the Proxy.*—The covenant which makes the engagements between the proxy and the person who constitutes him is formed when the procuration, or letter of attorney, is accepted. And if the parties are not present, the covenant is accomplished whenever the proxy charges himself with the order that is contained in the procuration, or letter of attorney, or executes it. For then his consent is joined to that of the person who has constituted him.<sup>c</sup>

## IV.

1128. *If the Proxy is present.*—If the proxy is present, and accepts of the procuration, or letter of attorney, charging himself with the execution of what is contained in it, the covenant is formed at the same time.<sup>d</sup>

## V.

1129. *The Manner of giving the Power.*—One may give a power to treat, act, or to do any other thing, not only by a procuration, or letter of attorney, in due form, but also by a bare missive letter, or note in writing, or by a third person who carries the order, or by other ways which explain the commission or power that is given: and if the person to whom it is given accepts of it, or executes it, the mutual consent forms at the same time the covenant, and the engagements which are the consequences of it.<sup>e</sup>

## VI.

1130. *The Procuration may be Conditional.*—The procuration may be conditional, and with such restrictions, limitations, and other clauses as one pleases, provided only that it contain nothing unlawful or dishonest.<sup>f</sup>

<sup>b</sup> L. 1, D. de procur.

<sup>c</sup> L. 1, § ult. D. de procur.; — l. 42, § 2, cod.; — l. 3, § 1, D. mand.; — l. 1, D. de mand.

<sup>d</sup> L. 1, § 1, D. de procur.

<sup>e</sup> L. 1, D. mand.; — l. 1, § 1, D. de procur.

<sup>f</sup> L. 1, § 3, D. mand.; — l. 6, § 3, cod.; — l. 22, § 6, cod.; — §§ 7, 12, Inst. cod.

VII.

**1131. *Procuratio General or Special.***—One may constitute a proxy, either for all affairs in general, or for some only, or for one particular affair. And the proxy has his power regulated according to the extent and bounds set to it in the procuratio, or letter of attorney.<sup>s</sup>

VIII.

**1132. *Power Indefinite, Regulated, and Limited.***—The procuratio may contain either an indefinite power to the proxy to do whatever he thinks proper, or only a power limited to what shall be expressly mentioned in the procuratio.<sup>b</sup> And the engagements of the master, and of the proxy, are different, according to this difference of the procurations, and according to the rules which shall be explained in the second and third sections.

IX.

**1133. *The Function of a Proxy is Gratuitous.***—Proxies doing commonly an act of kindness, and performing the office of a friend, their function is gratuitous: and if it were agreed to give any salary, it would be a kind of letting and hiring, where the person who should act for another would give for a certain price the use of his industry and labor.<sup>c</sup> But the reward that is given without agreement, and as an honorable acknowledgment of a good deed, is of another kind, and does not change the nature of the procuratio.<sup>d</sup>

X.

**1134. *A Proxy for an Affair in which he himself is interested.***—A proxy may be constituted, not only for the bare interest of the person who constitutes him, but sometimes also for the interest of the proxy himself, where both the one and the other are interested in the same thing.<sup>e</sup> Thus, in a contract of sale, the seller may constitute the buyer his proxy, to recover out of the hands of a third person the titles of his right to the estate that is sold: and the purchaser may appoint the seller his proxy, to receive from a depository, or from a debtor of the purchaser, the

<sup>s</sup> L. 3, § 1, D. de procur.; — d. § in fine.

<sup>b</sup> L. 1, § ult. D. mand.; — § ult. Inst. cod.

<sup>c</sup> L. 12, C. mand.; — l. 48, D. mand.

<sup>d</sup> L. 6, cod.

<sup>e</sup> L. 2, § 4, D. mand.; — § 2, Inst. cod.; — l. 34, D. de procur.; — l. 42, § 2, cod.; — l. 55, cod.

money which he destines for the payment of the price of the sale.

## XI.

1135. *A Procuration for the Affair of a Third Person.* — One may by a procuration, a mandate, or commission, charge one with the affair of a third person, whether he who gives the order or he who accepts it have interest in the affair or not.<sup>a</sup> And the said order puts the person who gives it under a twofold engagement; for it obliges him to answer to the third person for what shall have been ill transacted by the person whom he employs in his concerns;<sup>b</sup> and it lays him likewise under an obligation to the person whom he has employed in the concerns of that third person, to be accountable to him for all the consequences of the engagement into which he makes him enter; such as that of getting what he shall have transacted well to be ratified by the party concerned, and of procuring him reimbursement of all the reasonable charges he shall have been at.<sup>c</sup>

## XII.

1136. *The Effect of a Procuration to manage the Affairs of a Third Person.* — Although nobody can properly contract for another,<sup>d</sup> yet if he who has undertaken to be the friend of an absent person, to manage an affair, to cultivate an estate, or to do any other thing for the said absent person, fails, without just cause, to execute what he has promised, he shall be liable for the consequences of his non-performance of the said engagement, according to the circumstances. For although this absent person have stipulated nothing, and on his part there be no covenant, yet the damage which he suffers through the fault of the person who, having taken upon him the care of his affairs, which otherwise he would have intrusted to others, has neglected them, gives him a right to sue for reparation of damages, in the same manner as all those persons have who suffer any loss through the fault or crime of others.<sup>e</sup>

<sup>a</sup> L. 2, D. mand.; — Inst. de mand.; — § 3, Inst. de mand.; — l. 2, § 2, D. cod.

<sup>b</sup> L. 21, § ult. D. de neg. gest.

<sup>c</sup> L. 15, D. cod.; — l. 27, § 4, D. mand. See the following article.

<sup>d</sup> L. 38, § 17, D. de verb. obl. See the third article of the second section of Covenants.

<sup>e</sup> L. 2, D. mand.; — d. l. § 2, l. 6, § 4, cod.; — l. 33, in f. D. ad. leg. Aquil.; — § ult. Inst. de lego Aquil.; — l. 11, D. de prae. verb.

XIII.

1137. *Of Advice and Recommendation.*—We must distinguish between procurations, mandates, and commissions, wherein one gives an express charge, with design to form a covenant that obliges, and the ways of engaging by an advice, by a recommendation, or by other ways which imply no design of forming a covenant, but which have regard only to the interest of the person to whom the advice is given, or of him who is recommended, and which leave the person at free liberty to do, or not to do, what is advised or recommended. For in these cases there is no engagement formed, and he who follows an advice, or who grants any thing upon a recommendation, does not expect that the adviser or recommender should answer for the events.\* But if the person who gave the advice, or who recommended, was guilty of any fraud; or if he engages one in some loss that may be imputed to him, as if he should persuade one to lend money to an unknown person, to whom one lends barely on the assurance which he gives that the money shall be faithfully repaid, he shall be bound to make it good.<sup>†</sup>

SECTION II.

OF THE ENGAGEMENTS OF THE PERSON WHO EMPLOYS ANOTHER AS HIS PROXY, FACTOR, OR AGENT, IN ANY BUSINESS.

ART. I.

1138. *How the Engagement is formed between the Proxy and him who appoints him.*—He who has given a procuration, commission, or other order, to an absent person, begins to be engaged to him from the moment that he to whom the order is given has begun to execute it; and his first engagement is to approve and ratify what has been done pursuant to the power which he has given.\*

II.

1139. *Expenses laid out by the Proxy or Agent.*—If the proxy or other agent, has been at any expense in executing the order

\* L. 2, § ult. *D. mand.*; — § 6, *Inst. cod.*; — l. 12, § 12, *D. cod.*

† L. 47, *D. de reg. jur.*; — l. 6, § 5, *D. mand.*; — v. l. 10, § 7, *cod.*; — l. 1, *D. quod jure.*

L. 3, § 1, *D. mand.* See the first article of the fourth section.

with which he was charged, as if he has made a journey, or advanced a sum of money, he who has employed him shall be bound to reimburse him of the reasonable charges which he has laid out in executing the order; even although the affair had not the desired success, unless it miscarried through his fault.<sup>a</sup> But he will not recover the useless or superfluous expenses which he has laid out without order.<sup>a</sup>

## III.

1140. *If the Proxy has disbursed more than the Owner would have done.*—Although the expenses laid out by the proxy should exceed what the owner of the thing would have bestowed on it, if he had looked after it himself, yet the owner will be bound nevertheless to refund all that has been disbursed reasonably and honestly, although with less precaution and less husbandry than he himself would have used.<sup>d</sup>

## • IV.

1141. *The Interest of Moneys advanced by the Proxy.*—He whose procuration, or other order, hath obliged the person charged with it to advance money, whether it be that the proxy, or other person employed, have borrowed the money, or advanced it of his own, shall refund, not only the money laid out, but also the interest of it, according to the circumstances, whether it be because of the interest which he who hath made the advance hath paid for the money himself, if he borrowed it; or to indemnify him as to the loss which the said advance may have occasioned him. For as he ought not to reap any profit by the good office which he does, so neither ought he to suffer loss by it.<sup>e</sup>

## V.

1142. *If two or more Persons have appointed a Proxy.*—If several persons have named a proxy, or agent, or given any order, every one of them will be liable for the whole consequences of the procuration, mandate, or commission; and to reimburse, indemnify, and save harmless the proxy, if there be occasion for it, as much as if he alone had given the procuration, or other order, although

<sup>a</sup> L. 10, § 9, D. mand.;—l. 20, § 1, C. cod.;—l. 4, C. cod.

<sup>d</sup> D. l. 10, § 10, D. mand.

<sup>e</sup> L. 27, § 4, D. mand.

<sup>e</sup> L. 1, C. mand.;—l. 12, § 2, D. mand.;—l. 1, C. cod.;—l. 20, D. cod.

there be no express mention made, in the contract of every one of them being bound for the whole. For he who hath executed the order hath done it on the engagement of every one of them who gave it; and he may say that he would not have done it without this security of having every one of them bound for all the consequences of the order which had been given.\*

## VI.

1143. *Of the Losses sustained by the Proxy on Account of the Affair which he takes in Hand.*—If a proxy or agent suffers any loss or damage on account of the affair which he has taken in hand, we must judge by the circumstances whether the loss ought to fall on the proxy, or on the person whose affair he manages. Which will depend on the quality of the order which was to be executed,—the danger, if there was any,—the nature of the event which has occasioned the loss,—the connection between the event and the order that was executed,—the relation which the thing lost, or the damage sustained, had to the affair which was the occasion of it,—the quality of the persons,—that of the loss,—the nature and value of the things lost,—the causes of the engagement between the person who gave the order and him who executed it,—and on the other circumstances which may charge the one or the other with the loss, or discharge them of it. As to which we must cast into the balance the consideration of equity, and the sentiments of humanity which one ought to have, whose interest has been the cause or occasion of loss to another.\*

\* L. 59, § 3, *D. mand.*

§ See the twelfth and thirteenth articles of the fourth section of *Partnership*, and the remark on the twelfth article. L. 26, § 6, *D. mand.*; — d. l. 26, § 7; — l. 61, § 5, *D. de furtis*. We have not set down in this article any particular examples, that we might not perplex the reader. But we shall here subjoin some instances which may be of use for making the application of the rule.

If he who charges himself with the affairs of another person takes such care of them as to neglect his own concerns, the losses which he may suffer on this account will lie at his own door, for he ought to have taken proper measures for his own affairs at the time when he undertook the management of the affairs of others. See the thirteenth article of the fourth section of *Partnership*.

If a person undertaking to go for another to a place where his own business obliges him to take some money along with him, and he embracing the occasion, and carrying the money, was robbed of it, the person with had engaged him to make the journey will not be liable for the said loss, which does not concern him in any manner whatsoever.

If any one being obliged to make a journey or voyage, which robbers, a hazardous passage by sea, or other dangers, render perilous, engages another person to perform the said journey or voyage, who is willing to expose himself to the danger, whether it be



## SECTION III.

OF THE ENGAGEMENTS OF A PROXY AND OTHER AGENTS; AND OF  
THEIR POWER.

## ART. I.

1144. *Liberty of accepting the Order, Necessity of executing it.* — As a proxy and other agents are at liberty not to accept the order and power which is given them, so they are bound, if they do accept it, to execute it; and if they fail to do it, they will be liable for the damages which they shall have occasioned by their not acting; unless they have a lawful excuse to plead, such as sickness, or some other just cause of hindrance.<sup>a</sup>

## II.

1145. *The Order is to be executed in its Full Extent.* — The procuration, or other order, ought to be executed fully, according to the extent or bounds of the power given.<sup>b</sup>

## III.

1146. *Extent and Limits of the Power.* — If the order or power given marks precisely what is to be done, he who accepts and executes it ought to keep close to what is prescribed in it. And if

through necessity, because of the recompense promised him for his pains, or out of pure generosity, and he is robbed, or loses his baggage by shipwreck, or is wounded, the person who exposed him to this danger that he might free himself from it, will he have no share in the loss, and shall he not be bound to bear either the whole loss, or a part of it according to the circumstances?

If one friend, lending to another friend money which is to be transported to the country in order to pay off a debt, undertakes likewise to carry it to the country, and as he is going thither with the money is robbed of it by the way, must he bear the loss of this unforeseen accident, and will he not recover the said money, which he had not only promised and destined for the said payment, but which he was actually carrying into the country for that end? See the fourteenth article of the fourth section of *Partnership*.

If the father of a son that is given to debauchery, having engaged one of his friends to keep him in his house for some time, the said son robs the friend, shall not the father be bound to make good the damage done to his friend by his son?

If a person that is rich and of quality engages one of a lower rank and of a small fortune to make a journey for some business of his, and he chances to be robbed and wounded, will not justice oblige that person to make good the said loss, which he is bound to do by an indispensable duty of humanity?

<sup>a</sup> L. 22, § ult. *D. mand.*; — l. 5, § 1, *cod.*; — l. 6, § 1, *cod.*; — § 11, *Inst. cod.*; — l. 23, *de a. 25, D. mand.*

<sup>b</sup> l. 5, *D. mand.*; — l. 41, *cod.*; — § 8, *Inst. cod.*

the order or power be indefinite, he may set such bounds to it, or give it such extent, as may reasonably be presumed to be agreeable to the intention of the person who gives it; whether it be with regard to the thing itself that is to be done, or the way of doing it.\*

## IV.

1147. *The Care that Proxies and other Agents are obliged to.*— Proxies and other factors or agents are obliged, both in honor and duty, to take care of the affairs which they have undertaken to look after, and to manage them, not only with integrity, but also with diligence and exactness. And although they be negligent in their own affairs with impunity, yet they ought to have in the concerns of others which they undertake to manage more circumspection than in their own; and they are accountable for the damage which their negligence may have occasioned; but not for accidents.<sup>d</sup>

## V.

1148. *Bounds of this Care.*— It cannot be imputed as a fault to a proxy or other agent, if, in the discussion of an affair committed to him, such as the transacting or prosecuting a lawsuit, he does not search into the nicest subtilties for the interest of the person who has employed him. But it sufficeth if he gives a reasonable application, and his conduct be such as good sense and honesty may require.\*

## VI. . .

1149. *One may better the Condition of the Person who employs him, but cannot make it worse.*— The proxy, or other agent, may better the condition of the person who employs him, but cannot make it worse. Thus, he may buy a thing at a lower price than what he was empowered to give, but he cannot buy it dearer.<sup>e</sup>

<sup>d</sup> L. 5, D. mand.; — l. 12, C. cod.; — l. 46, D. cod. See the fourth article of the second section of Covenants.

<sup>e</sup> L. 23, D. de reg. jur.; — l. 13, C. mand.; — l. 11, C. cod.; — l. 8, § 10, D. cod.; — l. 29, cod.; — l. 9, C. cod.; — l. 21, C. cod.

<sup>f</sup> L. 10, D. mand.; — l. 29, § 4, cod. Although this last text relates to a surety, yet it may be applied to a proxy. And likewise this law is placed in the title *Mandati*, because the surety is as it were a proxy, as has been remarked in the preamble to this title. See the ninth article of the third section of Sureties.

<sup>g</sup> L. 3, D. mand.; — d. l. § 2; — § 3, Inst. cod.; — l. 49, D. de procur.; — l. 5, D. mand.; — s. l. 3, § 2, cod.

## VII.

1150. *If the Proxy buys at a dearer Price than he was empowered to give.* — If he who had power to buy at a certain price buys the thing dearer, and the person who had employed him refuses to ratify the bargain, the proxy or factor will be at liberty to confine himself to the recovery of the price which he was empowered to give; and in this case the ratification cannot be refused him, if there are no other circumstances.

## VIII.

1151. *Proxies and other Agents are bound to give an Account.* — Proxies and other persons employed in the management and administration of any business are bound to give an account of their management, and to make restitution honestly of what they have received, such as the fruits, if there were any, and other profits, and every other thing that may have accrued from the affair which they managed; and they also recover their expenses. And if it has been agreed to give a salary, or if any be due, as if it is a factor or steward, the salary must be paid them. And in this case they will not recover the expenses which they are obliged to lay out of their own salaries.<sup>a</sup>

## IX.

1152. *Advocates and Proctors cannot stipulate a Share of what shall be recovered in a Lawsuit, nor purchase Litigious Rights.* — Although a proxy or agent may receive a salary, yet he who is employed as a proctor or attorney at law in a lawsuit cannot stipulate a share of what shall be recovered of it; because it is against good manners for any one to interest himself by such a motive in a lawsuit, in which he is bound to serve his client by his function; and neither advocates nor proctors can make any bargain of this kind,<sup>b</sup> no more than they can purchase litigious rights.<sup>c</sup>

<sup>a</sup> L. 3, § ult. et L. 4, D. mand.; — § 8, Inst. cod.

<sup>b</sup> L. 46, § 4, D. de procur.; — l. 10, § 2, D. mand.; — l. 20, § 1, C. cod.

<sup>c</sup> L. 53, D. de pact.; — l. 5, C. de postul.; — l. 7, D. mand. It is this agreement which is so odious, and so justly condemned, that is commonly called *pactum de quota litis*, of which it is easy to perceive the iniquity and bad consequences it may have in relation to the public.

<sup>d</sup> L. 15, C. de procur.; — l. 20, C. mand. See the preamble of the eighth section of the Contract of Sale.

XI.

1153. *The Power of him who has a General Procuration.* — He who has a general procuration for the administration of all the affairs and all the concerns of another person may call in the debt, refer a matter in dispute to the oath of the party, receive the rents, and pay off what is owing.<sup>a</sup> And in general all proxies may do whatever is comprehended within the letter of the procuration, or intention of the persons who have employed them, and whatever naturally follows from the power that is given them, or is necessary for executing it.<sup>b</sup> Thus, the power of receiving what is due implies that of giving a discharge; thus, the power of demanding a debt implies that of distraining the goods of the debtor.

XI.

1154. *A Special Power is requisite for transacting or alienating.* — A general procuration is not sufficient to empower one to demand in another's name the rescission of a contract or restitution of things to their former state and condition; for to do this a change of will is necessary, which ought to be expressed. Neither is such a general power sufficient for transacting or alienating, but a special power is requisite for that purpose. For to transact and to alienate is commonly to diminish the goods. And it is only the owner of them who can dispose of them in this manner. But a proxy or agent who has only a general power may sell the fruits, and other things which may easily be spoiled, and which a good husband ought not to keep.<sup>c</sup>

XII.

1155. *Non-performance of the Procuration, Things remaining still in their former State.* — If the proxy or other agent hath failed to execute the order which he had received, the things being in such a condition that there arises no prejudice from thence to the person who employed him, the bare non-performance of the order engages him to nothing.<sup>d</sup>

<sup>a</sup> L. 58, D. de procur.; — l. 17, § ult. D. de jurejur.; — l. 59, cod.

<sup>b</sup> L. 56, D. de procur.; — v. l. ult. § ult. D. mand.

<sup>c</sup> L. 25, § 1, D. de min.; — l. 60, D. de procur.; — l. 63, cod.

<sup>d</sup> L. 8, § 6, D. mand.

## XIII.

1156. *Two Proxies for the same Thing.* — If two persons have been made proxies, or intrusted with the direction of the same affair, and both the one and the other undertake it, they will be answerable each of them for the whole, unless the power that is given them regulate it otherwise. For the affair is intrusted both to the one and the other; and each of them makes himself answerable for it when he accepts the order.<sup>1</sup>

## XIV.

1157. *When two Proxies are named, and one transacts without the knowledge of the other.* — If, two persons being named proxies for doing a thing which one of them might do without the other, such as receiving payment of a debt or prosecuting a lawsuit, one of them has done the business by himself, he has consummated the power of both; and the second has no more power in what is already done.<sup>2</sup> But if the two were named to treat jointly about an affair, and not one without the other, nothing would oblige the person who employed them, except what has been transacted jointly by them both together. For they could not divide the power which they had but in conjunction with one another. Thus, for instance, if two persons had an indefinite power to transact a lawsuit of the persons who employed them, and one transacts it without the other, the transaction may be disavowed by the party concerned. For he had not the power to transact the business all alone; and the presence of the other might have helped to better the condition of their principal.<sup>3</sup>

## SECTION IV.

IN WHAT MANNER THE POWER OF THE PROXY OR OTHER AGENT,  
EXPIRES.

## ART. I.

1158. *The Power of the Proxy ends by Revocation.* — The power and charge of a proxy or other agent expire by the change of the will of the person who made choice of him. For this choice is free, and he may revoke his order whenever he thinks fit, provided

<sup>1</sup> L. 60, § 2, D. mand.

<sup>2</sup> L. 32, D. de procur.

<sup>3</sup> L. 5, D. mand.

he makes known his revocation to the person whom he revokes, and that all things be still entire. But if the proxy or other agent had already executed the order, or begun to execute it, before he knew any thing of the revocation, it would be without effect as to what had been already executed; and he will be indemnified as to any obligation into which the said order may have engaged him.<sup>a</sup>

## II.

1159. *The Naming of a Second Proxy revokes the Power given to the First.* — He who, having appointed one to be his proxy or agent, does afterwards name another for the same business, revokes by that the power which he had given to the first.<sup>b</sup> But if the first had already executed the order before he knew of the revocation, he who had appointed him could not disavow what he had done.

## III.

1160. *The Proxy may discharge himself after having accepted the Procuration.* — The proxy or other agent may rid himself of his engagement after having accepted the procuration or commission, whether it be that he has particular reasons so to do, such as being seized with a distemper; or that some business has fallen out that hinders him; or that he had no other reason for his refusal, but his own will and pleasure. But it is necessary, if he refuses to execute the order which he took in hand, that his refusal be without fraud, and that he leave all things entire, and in such a condition that the master may be able to do the business himself, or by another. And if the proxy or other agent abandons and leaves the thing in danger, he shall be bound to make good the damage that ensues thereupon,<sup>c</sup> according to the rules which follow.

## IV.

1161. *He ought to acquaint his Principal with the Change of his Resolution.* — If the proxy or other agent will throw up the procu-

<sup>a</sup> L. 12, § 16, *D. mand.*; — § 9, *Inst. cod.*; — l. 15, *cod.* See the first article of the second section.

<sup>b</sup> L. 31, § ult. *D. de procur.*

<sup>c</sup> L. 22, § ult. *D. mand.*; — d. § 2, *Inst.*; — l. 27, § 2, *cod.*; — l. 20, *D. de procur.*; — v. l. 17, § ult. et l. seq. *D. cod.*; — l. 22, et seq. *D. mand.* See the following articles.

ration, or commission which he had accepted, he cannot do it but by making it known to the person who employed him. And if he fails to do that, he shall be bound to make good all damages and losses. For having taken charge of his affair, it would be a cheating of him to abandon it without acquainting him beforehand.<sup>a</sup>

## V.

1162. *If the Proxy is not able to acquaint his Principal with the Impediment that hinders him to execute his Order.* — If he who had accepted a commission or other order is not able to execute it because of some obstacle that has happened, and which he could not know; as if, in a journey which he had undertaken, he falls sick by the way, and can give no advice of it, or that the advice proves useless, coming too late; the losses which may follow from the non-performance of the order in such cases will fall on the person who gave it. Because they are unforeseen accidents, which regard the master.<sup>b</sup>

## VI.

1163. *Procurations and other Orders expire by the Death either of the Giver or Acceptor.* — Procurations and other orders expire by the death of the person who gave the order, or of him who accepted it. But this is to be understood according to the rules which follow.<sup>c</sup>

## VII.

1164. *A Proxy who continues to act, being ignorant of the Death of the Person who employed him.* — If the proxy or other agent, being ignorant of the death of the person who had employed him, continues to execute the order, what he has done honestly and fairly under that ignorance shall be ratified. For his good intention gives to what he has transacted the effect of the power which the deceased had given him.<sup>d</sup>

<sup>a</sup> L. 27, § 2, *D. mand.* See the following article.

<sup>b</sup> L. 27, § 2, *in fin. D. mand.*

<sup>c</sup> § 10, *Inst. de mand.*; — l. 26, 27, § 3, l. 58, *D. cod.*; — l. ult, *D. de solut.*; — l. 15, *C. mand.* See the following articles.

<sup>d</sup> § 10, *Inst. de mand.*; — l. 26, *D. cod.*; — l. 58, *D. mand.*; — l. 15, *C. cod.* But if a proxy or other agent were charged with an affair which could not admit of delay, such as the care of gathering in harvest, or any other pressing and important affair, and as he is going to execute the order, or after he has already begun it, he learns the death

## VIII.

1165. *If the Heir or Executor of the Deceased Proxy acts after his Death.*—If the proxy or other agent happens to die before he began to execute the order, and his heir or executor, being ignorant that the power was at an end by the said death, takes upon himself to execute the order, whatever he does will be of no prejudice to the master, and will be annulled. For this ignorance does not give the heir or executor a right which he had not, and which went no farther than the person who was made choice of.<sup>a</sup>

## TITLE XVI.

OF PERSONS WHO DRIVE ANY PUBLIC TRADE, OF THEIR FACTORS, AND AGENTS, AND OF BILLS OF EXCHANGE.

1166. *The Matters contained in this Title.*—The covenants of which we have spoken hitherto, except that of a necessary deposit, are transacted by the mutual consent of the persons who are willing to treat together; and the engagements which are formed by those covenants are preceded by a reciprocal liberty which the parties contracting have to treat with one another, and to make choice of one another; that is to say, if they do not like of one person, they may treat with another, or keep from treating and engaging themselves at all. But there are other covenants in which one has not the choice of the persons with whom he is to treat, nor is he at liberty to abstain from all manner of engagement: and where necessity obliges him to have to do with certain persons who drive public trades, of which the laws, for this reason, have settled the conditions; on purpose that these persons may not make a bad use of the necessity which people are under to treat with them and to trust them.

of the person from whom he received his order, and he could not give notice of it to the heirs or executors, who happen to be absent, might not he, and even ought not he, to execute the order?

<sup>a</sup> L. 37, *D. mand.* But if the heir or executor of the proxy, knowing the order that was given him, and seeing that the absent master could not look after his own affair, and that there would be danger of some loss if he did not take care of it, would not he be obliged to do what was in his power, such as to continue to till the lands, or to gather in the harvest?



1167. Thus, travellers are obliged to trust their clothes and baggage in inns; which produces an engagement between them and the innkeepers.

1168. Thus, they who, having any journey or voyage to make to places to which they may have the convenience of going in a stage-coach by land, in a ship by sea, or in a boat on a river, and having no travelling equipage of their own, are obliged to make use of those public conveyances both for their persons, their clothes, and their goods. And this forms a reciprocal engagement between them and the masters of those public conveyances. And it is the same thing with respect to those who, without travelling themselves, have clothes or goods to send from one place to another.

1169. Although it may seem as if the engagements of innkeepers and carriers were only the same with those of letting and hiring, and of a deposit, it being by a kind of letting and hiring that we treat with them, and that they become depositaries of what is committed to their charge; and that, therefore, there seems to be need of no other rules for them than what we have in these two kinds of contracts; yet the consequence of the fidelity that is required in these kinds of professions subjects them to other rules that are peculiar to them. And there is this besides particular in these kinds of commerces, that the persons who drive them not being able of themselves to manage their whole business, because of the multitude of persons who have to deal with them, and that at all hours of the day they are necessitated to employ other persons to look after their concerns; this obliges them to answer for the acts of those factors or agents whom they employ under them. And although this engagement, with respect to these factors or agents, has many rules which are common to it, and to procurations and commissions, yet it has some that are peculiar to it. Thus, all the rules which relate particularly to innkeepers, masters of ships, coachmen, and carriers ought necessarily to be distinguished from the others, and they shall be explained under this title.

1170. *Bank Remittance of Money and other Commerces.* — There are, likewise, commerces of other kinds, which the public advantage and convenience render necessary; and which have this in common with those of which we have been just now speaking, that the persons who drive these commerces contract by themselves, and by their factors or agents, engagements in the security

of which the public is concerned; such as the commerce of a bank, remittance of money, and others which are carried on by bankers and other traders. Which requires that we should insert in this title some rules which relate in general to all these kinds of commerces, and the engagements that are peculiar to them. And because one of these commerces, which is that of bills of exchange, is a kind of covenant distinct from all the others, we shall explain the nature of it, and the principles that are essential to it, together with its rules that are common to the Roman law and to our practice, without entering into the particular regulations made in this matter by the ordinances of the kingdom.

1171. *Remark on some Laws quoted in this Title.* — It is to be observed in relation to the laws quoted in this title, that the greatest part of the rules of the engagements of innkeepers, carriers, and others which we shall have occasion to mention here, are scattered up and down in the several titles of the Roman law which treat of these matters; so that some of them which relate, for instance, to innkeepers, are applied only to carriers, and others which are common not only to innkeepers and carriers, but also to all other sorts of engagements which shall be treated of under this title, are only applied to some of them in particular. So that we have been obliged to apply the rules of one of these matters to the others, wherever they suit with them.

## SECTION I.

### OF THE ENGAGEMENTS OF INNKEEPERS.

#### ART. I.

1172. *Engagements of Innkeepers.* — There is formed between the innkeeper and traveller an agreement, by which the innkeeper obliges himself to the traveller to lodge him, and to take care of his baggage, horses, and other equipage;\* and the traveller on his part binds himself to pay his charges.

#### II.

1173. *A Covenant either Express or Tacit with the Innkeeper.* — This engagement is formed usually without any express covenant,

\* L. 1, D. *negot. camp. stab.*

by the traveller's bare entering into the inn, and his depositing his baggage and other things into the hands of the master of the inn, or of those whom he appoints to take care of it.<sup>b</sup>

### III.

1174. *In what Manner the Innkeeper is made accountable for the Things by the Act of Domestics.*—The innkeeper is accountable for the acts of those of his family and of his domestics; according to the functions in which they are employed. Thus, when a traveller gives to the servants who have the keys of the chambers a cloak-bag, or other things, or when he puts his horse into the stable, under the care of the hostler, the master of the inn is answerable for them. But if the traveller upon his arrival delivers a bag of money to a child, a scullion, out of the master's and mistress's sight, the innkeeper will not be answerable for a bag of this consequence deposited in such a manner.<sup>c</sup>

### IV.

1175. *Care of the Innkeeper.*—The master of the inn is obliged to watch, or cause to be watched by others, with all possible care, all the things that the traveller brings and deposits in the inn, whether it be in the presence or absence of the master. Thus, he is answerable, not only for his own faults, but even for the least neglect, either in himself or servants; and he is only discharged from what may happen by such accidents as the greatest care could not have prevented.<sup>d</sup>

### V.

1176. *Innkeepers answerable for Thefts.*—Although innkeepers are not paid in particular for watching or keeping what is deposited in the inn, but only for the lodging, and for other things which they furnish to travellers, yet they are, nevertheless, bound to take the same care as if they were expressly paid for watching the goods. For this is an accessory to the commerce which they drive: and it is for the interest of the public, considering the necessity under which travellers are to trust innkeepers, that they be bound to an exact and faithful care of the things committed to

<sup>b</sup> L. 1, § 3, *D. naut. caup.*

<sup>c</sup> L. 1, § ult. *D. fort. adv. naut. caup.*; — l. 1, § 3, *D. naut. caup. stab.*; — d. l. 1, § 5.

<sup>d</sup> L. 3, § 1, *D. naut. caup.* See the following article. He ought to take more care than one who is a bare depositary. See the third section of *Deposit.*

their custody; and that they be made answerable even for thefts. For otherwise they might with impunity commit the thefts themselves.\*

## VI.

1177. *They are accountable for the Acts of any of their Family or Domestics.* — If any one of the domestics, or of the family of the innkeeper, causes any loss to a traveller, as if he steals from him even that which was not specially intrusted with any of the people of the inn, or if he damages his goods, the master of the inn shall be accountable for the value of the thing lost, or of the damage done.<sup>f</sup>

## VII.

1178. *They answer for their Servants only for what they do in the Inn.* — The engagement of the innkeeper, for the act of his domestics, is limited to what is done in the inn; and if any of his servants steals any thing, or does any damage in another place, the master is not accountable for it.<sup>g</sup>

## SECTION II.

## OF THE ENGAGEMENTS OF MASTERS OF SHIPS, COACHMEN, AND CARRIERS.

1179. In this section we shall treat only of those engagements which relate to the care that masters of ships, coachmen, and carriers are bound to take of the baggage and goods which they take the charge<sup>o</sup> of. As for their other engagements, the reader may have recourse to the eighth section of *Letting and Hiring*, and to the tenth and eleventh articles of the second section of *Engagements that are formed by Accidents*.

\* L. 1, § 1, *D. naut. caup. stabul.*; — l. 5, *D. naut. caup.*; — l. un. § 3, *D. furt. adv. naut. caup. stab.* See the third article of the eighth section of *Letting and Hiring*. • •

<sup>f</sup> L. 1, *D. furti adv. naut.*; — d. l. 1, § ult. § — l. 6, § 3, *D. naut. caup.*; — l. 5, § 1, *cod.*; — r. l. 1, § 2, *D. de exercit. act.*; — § ult. *Inst. de obl. quæ quas. ex del. nasc.*

<sup>g</sup> L. ult. *D. naut. caup. stab.*

## ART. I.

1180. *Engagements of Masters of Ships, and their Care.*—The master of a ship or other vessel, who undertakes to carry by sea persons, baggage, or merchandise, is answerable for what is received on board his vessel, either by himself or by his agents. Which is not to be understood of the rowers, for instance, in a galley; for it is none of their business to look after the lading. And he is accountable for all the loss or damage that shall happen, either on board his ship, or on the quay, if the baggage and goods are received there. In the same manner the innkeepers are responsible, as has been said in the foregoing section.<sup>a</sup>

## II.

1181. *They are accountable for the Act of their Servants.*—The master of the vessel is answerable for the act of his mates and other agents, and of the persons employed in the service of the ship, and for navigating her. And if any of them causes any loss or damage on board the vessel, the master must answer for it.<sup>b</sup>

## III.

1182. *Persons that deal in Land and Water Carriage.*—Those who undertake the carriage of goods by land or water are answerable for the baggage and goods which they take charge of; according to the rules explained in this and the foregoing section.<sup>c</sup>

## IV.

1183. *The Fault of Masters of Ships and Land Carriers.*—All carriers by sea, land, or fresh water are bound to that care, industry, and experience which their profession requires. Thus, the master of a ship who should sail up a river without a pilot, and a land carrier who should be robbed travelling in the night-time, or out of the common road in a dangerous place, would be liable for the accidents that should happen, if such faults had given occasion to them.<sup>d</sup>

<sup>a</sup> L. 1, §§ 2 et 3, D. naut. caup.;—l. 3, cod.

<sup>b</sup> L. 1, § 2, D. de exercit. act.;—l. ult. D. naut. caup. See the sixth and seventh articles of the preceding section.

<sup>c</sup> L. 1, D. naut. caup.

<sup>d</sup> § 7, Inst. de lege Aquil.;—l. 8, § 1, D. cod.;—l. 25, § 7, D. locat.;—l. 13, § 2, D. loc.;—d. l. § 1;—l. 16, § 1, D. de rei vind.;—l. 36, § 1, cod.;—d. § in f. See the fifth article of the eighth section of *Letting and Hiring*, and the fourth article of the fourth section of *Damages occasioned by Faults*.

## SECTION III.

OF THE ENGAGEMENTS OF THOSE WHO CARRY ON ANY OTHER  
PUBLIC TRADE, BY LAND OR BY SEA.

## ART. I.

1184. *Engagement of Masters by the Act of their Factors or Agents.* — Those who keep merchant-ships for some trade; those likewise who for some commerce have warehouses, shops, or public offices; as also bankers, and, in general, all those who in their business by land or sea make use of factors, agents, and other overseers, are represented in what relates to that business by the persons whom they set over it, in such a manner that the act of their factors or agents is their own proper act. Thus, they are obliged to ratify what has been concluded with their factors or agents. Thus, they answer for the fact, fraud, or deceit of the persons whom they have set over their business.<sup>a</sup>

## II.

1185. *The Bounds of the Power of Factors, and other Overseers.* — Factors and overseers oblige by their act those who have employed them only in what relates to the commerce or business over which they are placed. Thus, he who is appointed supercargo of a ship, in order to traffic, to buy, sell, or barter, engages his master or principal in every thing relating to those affairs. Thus, he who is put in master of a ship, in order to transport persons and goods, engages the owner as to what concerns the said transportation. And both the one and the other bind likewise their master or constituent for all the consequences of the said commerce and transportations; such as the necessary expenses for equipping and refitting the ship. Thus, all other factors and overseers have their power regulated by the quality of their commission.<sup>b</sup>

## III.

1186. *Of him who is substituted by the Person chiefly intrusted with the Ship or Cargo.* — If he who is set over a ship, whether

<sup>a</sup> L. 3, D. de inst. act.; — l. 18, D. eod.; — l. 5, eod.; — l. 5, §§ 1 et 2, eod.; — l. 1, § 1, D. de exercit. act.; — l. 1, D. de inst. act.; — l. 1, D. de exercit. act.; — l. 1, § 10, D. de exercit. act.; — l. 5, § 3, D. de inst. act. See the fifth article of the second section of *Covenants*.

<sup>b</sup> L. 5, §§ 11 et 12, D. de inst. act.; — l. 1, § 7, D. de exercitoria actione; — l. 1, § 3, D. de exercit. act.; — d. l. § 12.

it be as master of her, for transporting goods and passengers, or as supercargo, for trading, substitutes another in his place, to do his office, the act of this substitute, employed by the person who was first intrusted with the ship or cargo will oblige the owner of the ship, or the merchant, in the same manner as the act of the person whom he first intrusted; although the said person had no power to substitute another in his place. For the necessity of treating with him who seems to have the charge of the ship or cargo, together with the power which he has received from the person who was first intrusted, and the reasonable presumption that it is by order of the owner of the ship or lading that he exercises the said office, give to what he does the same force as if the thing were done by the owner of the ship or cargo himself. Otherwise particular persons would be liable to be cheated upon the public faith. But this rule is not to be extended indifferently to factors and others set over any commerce or business at land, where the necessity of treating with them is not the same, where it is easier to learn who is the person employed as factor and how far his power extends.<sup>c</sup>

## IV.

1187. *When a Minor or Woman is employed as a Factor.* — If the factor or overseer be a minor, his engagements will oblige the master as much as if he were of age. For he who has made choice of him ought to blame himself for the consequences of the choice which he has made. And it would be the same thing if a woman were appointed factor, or set over any commerce which she is capable of managing.<sup>d</sup>

## V.

1188. *Of Women and Minors that drive those Trades.* — Women and minors may enter into all the engagements that have been spoken of in this title. And if they keep a bank, or drive any other trade, their engagements in any thing relating to the said trade will be as valid as those of other persons of full age.<sup>e</sup>

<sup>c</sup> L. 1, § 5, D. de exercit. act.

<sup>d</sup> L. 7, § ult., l. 8, D. de inst. act.; — l. 1, § 4, D. de exercit. act.; — l. 7, § 1, D. de inst. act.; — l. 1, § 16, D. de exerc. act.; — l. 4, C. de inst. et exerc. act.

<sup>e</sup> L. 7, § 1, D. de inst. act.; — l. 1, § 16, D. de exercit. act.; — l. 4, C. de inst. et exerc. act.; — l. 11, § 1, D. de inst. act. By the ordinance of the year 1673, in the title of Apprentices, Traders, &c., art. 6, all traders and merchants by wholesale or retail, as also bankers,

## VI.

1189. *The several Partners in a Commerce are all of them answerable in the whole for what their Factor does.* — If several partners concerned in the same commerce, or other affair that is in common among them, employ one and the same factor, his act will oblige every one of the partners for the whole of what he does or contracts. For every one of them has set him over the business; and the person who has contracted with the factor has perhaps had in his view only one of the partners, and has transacted with the factor purely in consideration of the security which he proposed to himself by having that partner bound for what the factor promised.<sup>f</sup>

## VII.

1190. *When several Partners drive any of these Public Trades, the Act of one Partner binds all the others for the whole.* — If two or more persons manage by themselves in partnership any of these public trades, he who has treated with one of the partners, in the name of the company, shall have all the other partners bound in the whole for what he has contracted.<sup>g</sup>

## VIII.

1191. *The Factor is not obliged in his own Name.* — Factors and agents, who treat only in this quality, are not bound in their own names by the engagements which they contract, on account of the business which is intrusted to them, and in the name of their masters.<sup>h</sup>

## IX.

1192. *In what Manner the Power of a Factor or Agent expires.* — The power of factors and agents is determined by their revocation. But if, after they are recalled, they treat with persons who knew nothing of their being recalled, what they shall have trans-

are reputed to be of full age, as to any thing done by them in the way of their commerce and bank; and they cannot be restored against any damage they may have suffered under pretext of minority.

<sup>f</sup> L. 39, § 3, *D. mand.*; — v. l. 2, *D. de duobus reis const.*; — l. 13, § 2, *D. de inñitor. act.*; — l. 6, § 1, *cod.*; — l. 4, §§ 1 et 2, *D. de exercit. act.* See the sixteenth article of the fourth section of *Partnership*.

<sup>g</sup> L. 1, § ult. et l. 2, *D. de exercit. act.* See the seventh article of the title of *Partnerships* in the ordinance of 1673, quoted at the end of the preamble.

<sup>h</sup> L. ult. *D. de inst. act.*



acted will oblige the master; unless the revocation has been published, if it was the custom so to do; or that by other circumstances the person who treated with the factor might have known that he ought not to have treated with him<sup>1</sup>.

## SECTION IV.

### OF BILLS OF EXCHANGE.

1193. *Explanation of the Nature of Bills of Exchange.* — The commerce of changing money for money is carried on two ways. The first is, by changing the species of money for others of the same value; such as pieces of silver for gold, and the coin of one country for that of another. The second is, where one gives money to a banker or other person in one place, that he may remit it to another place, whether it be within or without the kingdom. And it is only this second kind of commerce that we shall treat of here. For the other is only a bare sort of exchange, which is a contract of which we have explained the rules in its proper place. This commerce of remitting money from one place to another is carried on by the means of bills of exchange. And in order to the right understanding of the nature and rules of this matter, we must consider in this commerce the several persons concerned in it, and what passes with regard to every one of them.

1194. There are commonly in the commerce of bills of exchange three persons concerned, whom we ought to distinguish. There is he who wants to have his money remitted from one place to another; then he who receives it, as the banker does, who undertakes to remit the money; and thirdly, there is the person who delivers the money in the place to which it is to be remitted, such as the banker's correspondent. And there is often a fourth person concerned, viz. he to whom the person who paid in the money sends his order to receive it; and this fourth person may likewise transfer his right to others, to whom he gives his order. It may also so happen that there are only two persons concerned, he who gives the money, and he who receiving it in one place delivers it back in another place, to the same person

<sup>1</sup> L. 11, § 2, et seq. D. de inst. act.

who gave it him on that condition. We must in the next place consider the different covenants that pass between those persons.

1195. The covenant which passes between the person who gives the money, and him who undertakes to remit it to another place, hath in it some particular characters which distinguish it from all other kinds of covenants that may seem to have some resemblance with it. It is not a sale; for nobody sells or buys in it; and in the contract of sale there is a seller, who gives something else than money, as there is a buyer who gives nothing but money. It is not an exchange; for those who barter or exchange any thing, give something different from what they receive; and each party takes for his own use a thing which he stands in need of, and gives away another thing which he can spare; but in the commerce of bills of exchange, he who gives his money takes nothing in counterchange, and does not give one thing that he may receive another of a different kind; since he who received the money may restore the same individual species which he received. It is not a deposit; for he who has received the money remains answerable for it, although it should be lost by an unforeseen accident. It is not a loan; because he who receives the money does not borrow it. It would be a letting and hiring, if he who receives the money did nothing else but barely carry it to the place whither it ought to be remitted, having a certain allowance for carrying it, as is usual for messengers, carriers, and masters of stage-coaches to do, who take the charge of a bag of money, to carry it from one place to another, without answering for accidents, and according to the rules that have been explained in the title of *Letting and Hiring*; but when he who receives the money engages himself by a bill of exchange to remit it to another place, the money remains in his hands, at his peril, and is no longer the money of the person who gave it. Thus, it is not a letting and hiring; and consequently it is a covenant different from all the others, which consists in the commerce of transmitting money belonging to a person from one place to another, and which is distinguished from all these other kinds of covenants by the characters which we have just now remarked.

1196. The covenant that passes between the person who has received the money, whether banker or other person, and him to whom he gives order to pay it in another place, is a partnership, if they are partners and correspondents with one another; or it is a procuration, or commission, if the corresponsent be only the

factor or agent of the person who has received the money. Thus, this covenant hath its rules, which have been explained in the title of *Partnership*, and in that of *Proxies*, or letters of attorney.

1197. The covenant between the person, who has paid the money, and him to whom he gives his order to receive it, is either an assignment, if he substitutes him in his place, and transfers his right to him; or it is a procuration, if he gives him barely the power to receive the money for his use. Thus, this covenant hath its rules in the title of the *Contract of Sale*, where mention hath been made of transfers and assignments; or in that of *Proxies*.

1198. There is lastly another covenant, which passes between him who paid down the money, and the person who is ordered to answer the bill of exchange, when he accepts the bill. And this covenant is the same with that which passed between him who paid in the money, and him who received it; for it only adds the obligation of him who accepts the bill to that of the person who drew it; and it obliges the person who accepts the bill to pay it on the day and in the place specified in the bill.

1199. It will be easy to gather from these remarks what is the nature of bills of exchange, and what are the rules which we are to take from the other kinds of contracts, in order to apply them to what is transacted in this. What remains, therefore, would only be to explain the rules that are proper and peculiar to bills of exchange. But since the detail of this matter is regulated by the ordinance of 1673, under the title of bills of exchange, and that of the interest of change and rechange, it will be sufficient to add to the remarks already made one single rule, which comprehends all that is in the Roman law touching this matter, and that is agreeable both to the law of nature and to our practice.

We have not thought fit to make use here of the peculiar words that are used in the commerce of bills of exchange, such as the words *drawer*, *indorser*, and *acceptor*, that we might make the things which we had to say the more intelligible to beginners, by substituting in the room of these terms of art, which the dealers in this commerce are well enough acquainted with, the things themselves which they signify.

#### ART. I.

1200. *The Engagement of those who receive Money in order to pay the same Sum in another Place.* — Bankers and others who

receive money on condition to deliver the same sum at a certain time, and in another place, either themselves, or by their correspondents, are obliged to pay the same, or cause it to be paid by others, at the time and place appointed; and if they fail to do it, they are answerable for all the loss and damage which shall accrue thereby to him who gave the money on this condition, according as the said damage is regulated by law or custom.\*

## TITLE XVII.

### OF BROKERS. OR DRIVERS OF BARGAINS.

1201. *Use of Brokers.* — We may add to all the different kinds of covenants a matter which is as it were an accessory to them; that is, the use of brokers, or drivers of bargains, whose profession is to bring dealers together, and to mediate bargains between those who, according to their respective wants, are desirous, the one to sell and the other to buy; or to exchange, to let, or to hire, and to deal in any other commerce or affair, of what nature soever it be.

1202. This use of brokers is principally necessary in the seaports, and in trading-towns, to facilitate to strangers and others the commerce which they deal in, by addressing them to the persons with whom their business is, making known the intentions of the one to the other; serving as interpreter, if there be occasion; and rendering them the other services which they are capable of doing by their mediation. And there are even public officers, whose functions oblige them to deal in this sort of business; such as brokers licensed by public authority.

1203. This matter belongs to this place, not only as a consequence of covenants, but also because it contains a kind of covenant which passes between brokers and those who employ them, by which they regulate among themselves the conditions of the use and consequences of their mediation in driving the bargains.

\* L. 7, § 1, *D. de eo quod cert. loc.*; — l. 9, *eod.*; — v. l. 1, *C. ubi conv. qui cert. loc. d. p.*  
See the titles of the ordinance of 1673, quoted at the end of the preamble

## SECTION I.

## OF THE ENGAGEMENTS OF BROKERS.

## ART. I.

1204. *The Office of a Broker.*—The engagement of a broker is like to that of a proxy, a factor, or other agent; but with this difference, that the broker being employed by persons who have opposite interests to manage, he is, as it were, agent both for the one and the other, to negotiate the commerce and affair in which he concerns himself. Thus, his engagement is twofold, and consists in being faithful to all the parties, in the execution of what every one of them intrusts him with. And his power is not to treat, but to explain the intentions of both parties, and to negotiate in such a manner, as to put those who employ him in a condition to treat together personally.<sup>a</sup>

## II.

1205. *The Lawful Use of Brokage.*—All brokers have their functions limited to such commerce and affairs as are lawful and honest, and to the ways allowed for treating them and bringing them to a good issue. And all brokage in such commerce and other things as are unlawful, or by unlawful ways in such things as are permitted, forms no other engagement than that of repairing the harm that has followed upon it, and of undergoing the penalties which such unlawful dealing may have deserved, according to the quality of the fact, and the circumstances.<sup>b</sup>

## III.

1206. *The Engagement of Brokers.*—Brokers are not responsible for the events of the affairs in which they intermeddle, unless they have been guilty of some fraud, or some fault which may be justly laid to their charge; neither are they bound to warrant the sufficiency or ability of the persons to whom they procure money or any other thing to be lent, although they receive a recompense for their pains, and speak a good word in favor of the borrower; unless there had been either an express covenant by which they

<sup>a</sup> L. 3, in f. D. de præsent.

<sup>b</sup> L. 3, in f. D. de præsent. See the third and fourth articles of the fourth section of the Vices of Covenants.

are bound to warrant their own fact, or that it should appear that they had been guilty of some fraud in the matter.<sup>c</sup>

## SECTION II.

### OF THE ENGAGEMENTS OF THOSE WHO EMPLOY BROKERS.

#### ART. I.

1207. *Engagement of those who employ Brokers.* — Seeing the persons who employ brokers give them their orders, they are obliged to ratify whatever is transacted pursuant to the power which they gave; in the same manner as those who appoint proxies, or who give commissions and other mandates.<sup>a</sup>

#### II.

1208. *Salary of Brokers.* — If the broker does not give his service for nothing, he who has employed him owes him a salary, either such as has been agreed on, or according as it is regulated, if the broker be an officer who has his salary taxed, or such as shall be decreed him by the judge, if the parties do not agree the matter by mutual consent. For this function being lawful, it ought to have its salary proportionable to the nature of the commerce or other affair, to the quality of the persons, to the time employed about the business, and to the pains taken by the broker.<sup>b</sup>

## TITLE XVIII.

### OF THE VICES OF COVENANTS.

1209. *What are the Vices of Covenants.* — By vices in covenants is meant whatever is contrary to their nature and to their essential characters. Thus, it is an essential character of all sorts,

<sup>c</sup> L. 2, D. de proxenet.

<sup>a</sup> See the first article of the second section of *Proxies*.

<sup>b</sup> L. 1, D. de proxenet.; — l. 3, D. eod.; — v. l. 7, D. mand.; — l. 4, C. eod.; — v. l. 15, D. de prasc. verb.

of covenants, that the persons who make them have sufficient reason and knowledge of what is necessary to be done towards forming the engagement into which they are to enter.<sup>a</sup> And it is a vice in a covenant, if one of the parties contracting has wanted this knowledge; whether it were through a natural infirmity, as if he was a madman, or through some error, of the nature of those of which we shall have occasion to speak hereafter.

1210. Thus, it is an essential character of all covenants, that they be made with freedom and liberty;<sup>b</sup> and it is a vice in a covenant, if one of the contracting parties has been forced to it by any violence.

1211. Thus, it is another essential character of all covenants, that the treaty be carried on with sincerity and integrity;<sup>c</sup> and it is a vice in a covenant, if one party cheats the other by some fraud or surprise.

1212. Thus, it is also an essential character of all covenants, that they contain nothing that is unlawful and dishonest;<sup>d</sup> and it is a vice in a covenant, if any thing is inserted in it contrary to law or good manners.

1213. Thus, in fine, it is an essential character of all covenants, that the persons who make them be capable of contracting;<sup>e</sup> and the covenant is vicious, if one of the contracting parties was incapable of the engagement into which he has entered.

1214. *The Vices of Covenants have a different Effect according as they are higher or lower in Degree.* — These vices of covenants may be found in them in different degrees; and according as they are in a higher or lower degree, they annul or do not annul the covenants, and they engage or do not engage the parties to the consequences of damages.

1215. Thus, the want of knowledge may be such that it annuls the covenant, or such that it does not hinder it from subsisting. As, for example, if a legatee, to whom something had been bequeathed by a codicil which proved to be null, treats about his legacy, and gives it up to the executor, not knowing that there was a second codicil which confirmed the legacy, and which was

<sup>a</sup> See the second article of the second section of *Covenants*.

<sup>b</sup> See the same second article of the second section of *Covenants*.

<sup>c</sup> See the eighth article of the same second section of *Covenants*, and the twelfth article of the third section of the same title.

<sup>d</sup> See the first article of the second section of *Covenants*.

<sup>e</sup> See the third and subsequent articles of the fifth section of *Covenants*.

valid; this legatee would not lose the right he had by this second codicil, which he knew nothing of; and the treaty would be null, because of the want of the knowledge of this fact. But if the want of knowledge does not hinder the person from knowing well enough what it is he obliges himself to, this defect will not be sufficient to annul the covenant. Thus, he who has treated with his coheirs about their portions of the inheritance, while they were as yet all of them ignorant of certain debts, or other burdens, that come to be discovered afterwards, cannot pretend that this want of knowledge is sufficient to annul the treaty, when those debts and burdens come to light. For it was not upon an exact and perfect knowledge of all the particular rights and charges of the inheritance that his engagement was founded; but it suffices to confirm it, and to make it irrevocable, that he knew that an inheritance consists of rights and of charges which are often unknown even to the most clear-sighted heirs; and that under the uncertainty of more or less which could not be known, he has taken his chance of losing or gaining in a thing that was altogether uncertain.

1216. Thus, the want of liberty may be such as that it annuls the covenant; as if one of the covenanting parties was carried away by force, and threatened with death if he did not engage himself. But if he complains only that the dignity or authority of the person with whom he treated made such impressions on him as to oblige him to give a consent, which he would not have done without that circumstance; these sorts of impressions, not being accompanied either with force or threatening, leave the liberty entire, and do not make the covenant void.

1217. Thus, deceit is not always such that it sufficeth to annul the covenants; for it has only this effect when one makes use of some unlawful means, with a design to cheat, and engages thereby the person who is cheated to give a consent which he would not have given, if he had known any thing of the trick that is put upon him. As, if one, who has in his custody the title of a service due from his own estate, conceals the title, and transacts with the person to whom he owes the service, and gets him to desist from claiming it; this deceit will annul the transaction. But if the deceit is not that which engageth the party to contract, and if he might have guarded himself against any cheat, it may be such as may not be sufficient to annul the covenant; as if he who sells a horse does not tell the buyer that he is apt to stumble, or does



not answer the spur, or has any other such like faults which are not sufficient to make the sale void. For this kind of defect is not restrained, no more than the injustice of those who sell dearer, or buy cheaper than the true value; unless the price were regulated, as it is in some things by the civil policy, or by the common custom of trade. But these cases excepted, it is not possible to fix the just point between what is over and what is under the true value. Hence it is that it is said in a law of the Romans, that it is naturally lawful to sell dearer and to buy cheaper than the true value; and in this manner to cheat one another.<sup>1</sup> So the law expresses it; the meaning of which is, that the advantage which the seller or buyer may have one over the other as to the price either is not in effect a cheat, or, if it be attended with no other circumstances, it goes unpunished.<sup>2</sup>

1218. Thus, the incapacity of persons may be such that it annuls all the covenants they engage in, such as that of a madman; or only such as renders them incapable of some covenants, but not of all without distinction; such as that of married women, in some provinces, and of minors, who cannot engage themselves unless the obligation turn to their advantage.

1219. It is only unlawful covenants, and such as are contrary to law and good manners, that are wholly null without any temperment; for this vice cannot be tolerated in any degree.

1220. The vices of covenants which suffice to annul them have two effects. One is, to give occasion for dissolving the covenant, if the person who complains of it desires that it may be dissolved. And the other is, to oblige him who had used some unfair means to repair the damage which he may have occasioned, whether the covenant be dissolved or be allowed to subsist. And sometimes, likewise, the vices which are not sufficient to annul the covenants may give occasion for the reparation of damages, according to circumstances.

1221. We shall say nothing here of covenants which are vicious because of usury, and which are called usurious contracts; such as the obligations for the loan of money, wherein the interest is accumulated to the capital; the contracts which are made only to palliate usury, and to give the enjoyment of fruits for money lent, and others of the like nature. For seeing, as has been observed in

<sup>1</sup> L. 29, § ult. D. de loc.

<sup>2</sup> See the beginning of the third section, and the fifth article of the fifth section of the *Contract of Sale*, and the second article of the third section of this title.

the title of the *Loan of Money*, that usury is not prohibited by the Roman law; this matter does not properly come within the design of this work, and it hath its rules in the laws of the church, in the ordinances, in the customs, and in our usage.

1222. As to the other vices of covenants, we shall reduce such as shall be treated of under this title to four kinds. The first is, of those which are opposite to the knowledge that is necessary for contracting; the second is, of those which encroach on liberty; the third kind is, of such vices as are contrary to sincerity and integrity; and the fourth is, of such as are contrary to law and good manners. And these shall be the subject-matter of the four sections into which the title shall be divided.

1223. We shall not speak here of the vice which proceeds from the incapacity of the persons; for as there are different incapacities of minors, of married women (who in some provinces cannot bind themselves at all, and in others not without the consent of their husbands), of prodigals who are debarred from the management of their own estates, of madmen, and others; every one of these incapacities shall be explained in its proper place. And as to this matter, the reader may consult the title of *Persons*, the fifth section of the title of *Covenants*, the title of *Tutors*, that of *Curators*, as also that of *Doweries*.

## SECTION I.

### OF IGNORANCE OR ERROR IN POINT OF FACT OR LAW.\*

#### ART. I.

1224. *Definition of Error in Fact.* — Error, or ignorance of fact, consists in not knowing a thing which is. As if one who is named executor of a will knows nothing of the will; or if he knows of the will, and is ignorant of the death of the testator.

#### II.

1225. *Definition of Error in Law.* — Error, or ignorance of law, consists in not knowing what a law prescribes. As if a donee is

\* V. l. 1, § 3, l. 11, § 1, *D. de pign.*; — l. 39, *D. de pign. act.*; — l. 14, *C. de usur.*

\* See concerning this matter the first section of the title *Of those who receive what is not their Due*.

\* L. 1, § 1, *D. de fur. & fact. ign.*; — d. l. § ult.

ignorant that the donation ought to be registered; or if an heir or executor is ignorant of the rights that belong to him by virtue of that quality.<sup>b</sup>

### III.

1226. *One cannot be ignorant of the Law of Nature.*—Ignorance of law is to be understood only of the positive law, and not of the law of nature, which nobody can be ignorant of.<sup>c</sup>

### IV.

1227. *Difference between him who errs in Fact and him who errs in Law.*—He who is ignorant that a certain right is fallen to him may be in this ignorance, either by an error in fact, or an error in law. For if, for example, he be ignorant of his relation to the person whose succession is fallen to him, he is ignorant of his right, but through an ignorance of the fact. And if, knowing that he is related to the deceased, he thinks himself excluded by a nearer relation, not knowing that the right of representation calls him to the succession, it is through an error in point of law that he is ignorant of his right to succeed.<sup>d</sup>

### V.

1228. *Error of Minors, whether in Fact or Law, does them no Prejudice.*—Minors not having acquired by experience such a solid and perfect knowledge as is necessary for discerning the consequences of the engagements into which they may chance to enter; they are relieved from the covenants which turn to their prejudice, whether they err in matter of law or in fact,<sup>e</sup> in the same manner as they have relief, when they happen to be aggrieved in any thing by reason of their weakness, or through any want of conduct; as shall be explained in the title of the *Rescission of Contracts and Restitution of Things to their First Estate.*

### VI.

1229. *Error of Persons come to full Age, in matter of Fact or Law, has divers Effects.*—Persons come to full age, who are at liberty to enter into all sorts of covenants, even although they be

<sup>b</sup> L. 1, § ult. *D. de jur. et fact. ign.*

<sup>c</sup> L. 2, C. de in jue voc. See the ninth article of the first section of the *Rules of Law.*

<sup>d</sup> L. 1, § 2, *D. de jur. et fact. ign.*

<sup>e</sup> L. 9, *D. de juris et facti ign.*

to their prejudice, cannot always, as minors, be relieved against the damage which they may have sustained by their covenants, through ignorance of the law, or error in fact. But in some cases they may have relief, and in others they must bear with the loss,<sup>5</sup> as shall be explained in the following rules.

## VII.

1230. *Of Error in a Fact, which is the only Cause of the Covenant.* — If the error in fact be such that it is evident that he who has erred has consented to the covenant only because he was ignorant of the truth of a fact, so that the covenant happens to have no other foundation than a fact contrary to the truth which was unknown; such an error will be sufficient to annul the covenant, whether the party covenanting has engaged himself in any loss, or whether he has neglected to make use of a right that was fallen to him. For not only does the covenant prove to be without a cause,<sup>6</sup> but it has for its foundation only a false cause. Thus, if it happens that the heir or executor of a debtor, who in his lifetime had paid the debt, of which the acquittance cannot be found, obliges himself to the heir or executor of the creditor, he being ignorant of the payment already made; the obligation will be without effect, whenever the acquittance is found. Thus, if it happens that two executors dividing between them a succession, the one leaves to the other goods that were bequeathed to him by a codicil, and that afterwards this codicil proves to be forged; he may demand a new partition.<sup>h</sup>

## VIII.

1231. *If the Error in Fact is not the only Cause of the Covenant.* — If the error in fact has not been the only cause of the covenant, and if it hath some other cause independent on the fact which was unknown to the party covenanting, this error will not hinder the covenant from having its full effect. Thus, they who transact about all their affairs in general, cannot complain of having erred in the fact of one of them in particular. Thus, the heir who has sold

*in D. 2, D. de jur. et fact. ign.*

<sup>5</sup> See the fifth article of the first section of Covenants.

<sup>h</sup> L. 116, § 2, D. de reg. jur.; — l. 8, D. de jur. et fact. ign.; — l. 9, cod.; — l. 23, D. de condic. ind.; — l. 4, C. de jur. et fact. ign.; — l. 3, § 1, D. de trans.; — l. 12, in fine, cod.; — l. 6, cod. See the following article.

the inheritance will not be relieved against the sale, because he did not know all the effects that belonged to the inheritance.<sup>1</sup>

## IX.

1232. *Ignorance of Facts is presumed.*—Ignorance of facts is presumed, when there is no proof to the contrary. But this presumption, which is always natural in facts that do not concern us, does not take place in things which concern us. For every one is presumed to know what is his own proper act and deed.<sup>1</sup>

## X.

1233. *Error caused by Fraud.*—If it is by the fraud of one of the contracting parties that the other has been cheated by an error of fact, as if one concealed a title or deed belonging to the other, the covenant will be made void; and he who has concealed this title will be liable to make good all the loss and damage that shall have ensued upon the said fraud.<sup>m</sup>

## XI.

1234. *We are to judge of the Effect of the Error by the Circumstances.*—In all the cases where one of the contracting parties complains of an error in fact, we may judge of it by the foregoing rules, according to the circumstances; such as the quality and consequence of the error: the regard which the contractors have had to the fact which appeared to them to be true, and which proved to be otherwise: the effect which the truth that was hidden would have produced, had it been known to them: the easiness or difficulty that might have been in finding out the truth, if it has been concealed by the fraud of one of the parties: if what one pretends ignorance of was the act of the person who pleads ignorance: or if it be a matter which he may very naturally be presumed not to know: if the error is such that it was natural for him to fall into it, or if it is so gross that it ought not to be presumed:<sup>n</sup> and according to the other circumstances, which may determine the judge to receive the complaint of error, or to reject it.

<sup>1</sup> L. 29, C. de trans.

<sup>1</sup> L. ult. in f. D. pro suo;—l. 2, D. de jur. et f. ign.;—l. 3, eod.

<sup>m</sup> L. 19, C. de trans.

<sup>n</sup> L. 2, D. de jur. et f. ign.;—l. 3, eod.;—l. ult. in f. D. pro suo;—l. 6, eod.;—l. 8, § 1, eod.;—l. 9, § 2, eod.

## XII.

1235. *Error of Computation.*—The error of computation is a mistake, when in reckoning we put one number instead of another, which was the true one, and which we should have set down had it not been for that mistake. Which is a kind of error in fact different from all other errors, in that it is always repaired.<sup>o</sup> For it is always certain that the parties intended only to set down the true number, and they could not make another number supply its place.

## XIII.

1236. *Effect of the Error in Law.*—An error in law is not sufficient, as an error in fact is, to annul covenants.<sup>p</sup> For the ablest men alive may be ignorant of facts;<sup>q</sup> but nobody is excused from knowing the laws, and persons are subject to them although they be ignorant of them.<sup>r</sup> This error or ignorance of the law hath its different effects in covenants, according to the following rules.

## XIV.

1237. *If the Error in Law be the only Cause of the Covenant.*—If the ignorance or error in law be such that it is the only cause of a covenant in which one obliges himself to a thing which he was not bound to otherwise, and there be no other cause on which the said obligation can be founded; the cause proving to be false, the obligation will be null. Thus, for example, if he who purchases a fief situated in a custom where no fine is payable for the purchase, goes to the lord of the manor, and compounds with him for the fine which he supposed to be due; this covenant, which has no other foundation besides this error alone, will not oblige the purchaser to pay the fine which was not due.<sup>s</sup>

<sup>o</sup> *L. 1. C. de err. calc.*

<sup>q</sup> *L. 2. D. de jur. et fact. ign.*

<sup>r</sup> *D. 1. 2.*

<sup>s</sup> See the ninth article of the first section of the *Rules of Law*.

<sup>p</sup> *L. 8. D. de jur. et fact. ignor.* See the following article. It is to be remarked with respect to the example mentioned in this article, and that of the sixteenth article, that the ignorance of the dispositions of the customs is an ignorance of law, as much as the ignorance of the ordinances and other laws. For although the dispositions of customs be considered as facts, because, being only part of the positive law, and different in different places, it is natural that they be not all known, even to the most knowing persons; yet nevertheless they have the force of laws, which have their effect with regard to those that are ignorant of them, as well as those who know them.

## XV.

1238. *Another Effect of the foregoing Rule.*—The foregoing rule not only takes place in preserving the person who errs from suffering any loss, as in the case there explained; but it takes place, likewise, to hinder him from being deprived of a right which he did not know belonged to him. Thus, for instance, if the nephew of an absent person takes care of his affairs, and, the absent person happening to die, the brother of the deceased, as his heir and next of kin, demands of the nephew an account of his intromissions with the effects of the deceased; the nephew gives an account, and restores to his uncle all that remained in his hands belonging to the said succession, for want of knowing that he succeeded likewise to the deceased, by the right of representation of his father, who was brother to the deceased; he may afterwards, being informed of his right, demand his part of the succession.\*

## XVI.

1239. *A Case wherein the Ignorance of the Law is of no Avail.*—If by an error or ignorance of the law one has done himself a prejudice, which cannot be repaired without breaking in upon the right of another person, this error will make no change or alteration to the prejudice of that other person. Thus, for example, if he who has been born and bred in a country where persons are reputed to be majors at the age of twenty years, treats in another country, where the laws continue the minority to the age of five-and-twenty, with one who is under five-and-twenty years, but whom he knows to be upwards of twenty, and therefore believes him to be major, or if he lends him money, this error will not hinder the said minor from being restored, if there be ground for it. For it is a right which belongs to him by virtue of a law, the effect of which is not changed to his prejudice by that other person's ignorance. And if the money lent has not been profitably laid out, the error of the lender will not excuse him from bearing the loss. Thus, he who had given an estate in land in payment in a transaction, hoping to have it back again because of his being wronged in more than the half of the real value, could not under this pretext recover this estate, which his adversary had

\* L. 1, D. de jur. et fact. ign. — l. 36, in f. D. fam. erasc.

acquired by a title which the law does not allow to be annulled on account of any such damage sustained.\*

## XVII.

1240. *If the Error in Law is not the only Cause of the Covenant.* — If the error in law has not been the only cause of the covenant, and he who has done himself some prejudice may have had some other motive, the error will not be sufficient to annul the covenant. Thus, for example, if an executor treats with a legatee, and pays him, or obliges himself to pay him, his whole legacy, not knowing any thing of the right which he had to detain part of it, because the testator had bequeathed beyond what he had right to dispose of, either by law or custom; this covenant will not be null. For this executor may perhaps have obliged himself to pay the whole legacies, out of a motive of executing fully and entirely the will of the deceased to whom he succeeds. And it would be the same thing with respect to the heir or executor of a donor, who had executed or ratified a donation, which he did not know to be null for want of being registered.\*

## SECTION II.

### OF FORCE.

1241. *The Nature and Effects of Force upon Liberty.* — To know what is the effect of force in covenants, and what degree it ought to be of to make them void, it is necessary that we know what degree of liberty is requisite in the making of covenants; and that we observe that there is a great difference between the character of the liberty that sufficeth for rendering our actions good or bad, and the character of the liberty that is necessary in covenants.

1242. In the case of liberty to do good or evil, to commit a crime, an injustice, a bad action, violence may well weaken, but it does not altogether destroy, that liberty. And he who, yielding to

Si quis patremfamilias esse credidit, non vana simplicitate deceptus, nec juris ignorantia, sed quia publice patremfamilias plerisque videbatur: sic agebat, sic contrahiebat, sic muneribus fungebatur: cessabit senatusconsultum. • L. 3, D. de senatusc. Maced. It appears by this law, that if this creditor had erred in law he had lost his debt. See the remark on the fourth article.

\*L. 9, C. ad leg. Falc.; — l. 9, § 5, D. de jur. et fact. ign.



force, commits a crime; chooses to forsake his duty that he may avoid an evil of another kind. So that, notwithstanding the force, he commits the evil freely and of choice. But in covenants, when one of the parties has been forced to consent to it, the condition in which his liberty was did not leave him the use of it that was necessary for giving a consent which might bind him and render the covenant valid.

1243. The difference of these ways in which force is considered with respect to the liberty necessary in actions, and with respect to the liberty which one ought to have when he enters into a covenant, consists in this, that in actions, when the case is about the not committing of a crime, either in matters of faith, or in morals, he who in such a conjuncture yields to force, and commits evil, might and ought rather to have suffered the evils with which he was threatened, than fail in what he owed to truth or justice; the love of which, had he been sincere in it, would have enabled him to stand out against all terrors whatsoever, rather than abandon so essential a duty. Thus the force has not quite destroyed his liberty, but, weakening it, has engaged him to make a bad use of it, and to choose freely to commit an evil action, that he might avoid suffering. But when the case is about a force that does not compel us to the breach of any duty, but which puts us only under the necessity of bearing a loss, he who finds himself in such a conjuncture, that he must either abandon his interest, or, for the preservation of it, expose himself to the effects of violence, is in such a condition that he cannot use his liberty in choosing to preserve what others have a mind to make him lose. For although it be true that he might, if he pleased, suffer the evil with which he is threatened, yet reason determines his liberty to the choice of bearing the loss, and freeing himself by this lesser evil from one much greater, which his resistance would have drawn upon him. Thus it may be said, that he is not free, and that he is forced;\* seeing it would not be a prudent use of his liberty, if he should choose to resist the violence, and to expose himself to death, or other evils, that he might preserve his goods. For, in short, whatever is against prudence is contrary to the right use of liberty; seeing the right use of it is inseparable from reason, as the will is inseparable from the understanding. It is easy to judge from this remark on the liberty necessary

\* L. 21, § 5, *D. quod met. caus.*

in covenants, that if the violence be such that prudence and reason oblige him who is assaulted to abandon some part of his goods, some right, or other interest, rather than make resistance; the consent which he gives to a covenant that strips him of his goods, to ward off the danger that threatens him, has not the character of the liberty that is necessary for entering into engagements, and whatever he does in this condition, against his interest, ought to be annulled.

1244. *What Force annuls Covenants.* — It is further to be observed on the same subject of the effect of force in covenants, that all manner of force, all violence, all threatenings, are unlawful; and that the law condemns, not only such as expose the life to danger, or the body to any torment, but also all sorts of bad treatment, and all forcible means. And, in fine, it is to be remarked, that, seeing all persons have not the same courage to resist violence and threatening, and that many are so weak and fearful that they cannot stand out against the least impressions, we ought not to limit the protection of the laws against threatenings and violence so as to restrain only such acts as are capable to overcome persons of the greatest courage and intrepidity. But it is just likewise to protect the weakest and most fearful; and it is chiefly on their account that the laws punish all acts of violence and oppression.<sup>b</sup> Thus, as the laws punish those who by some deceit or surprise take advantage of the simplicity of others, although the deceit does not amount to a direct forgery or other excess;<sup>c</sup> so likewise with much greater reason do the laws chastise those who by any violent means strike terror into the minds of weak persons, although the violence do not go so far as to put the life in danger.

1245. It follows from all these principles, that, if a covenant has been preceded by any act of force, any violence, any threatening, that may have obliged the person who complains of it to give a consent contrary to justice and to his own interest, it will not be necessary for obtaining a redress, to prove that his life was in danger, or his person exposed to any other great violence. But if it shall appear by the circumstances of the quality of the persons, of the injustice of the covenant, of the condition in which the person was who brings the complaint, of the acts of violence, or of the threatenings, that the party gave his consent barely because

<sup>b</sup> *Levit. vi. 2; xix. 13.*

<sup>c</sup> *L. 1, D. de dolo*

of the force he was under; it will be just to annul a covenant, which has no other cause or foundation besides the force that has been used against him who has been engaged in a covenant contrary to justice and to his own interest.

1246. We have made here all these remarks, in order to establish the natural principles of the rules relating to this matter; and to give a reason why we have not inserted among the rules of this section that rule of the Roman law which says that we are not to reckon as violences sufficient to annul a consent those which can only influence weak and fearful persons; but that the violence must be such as to strike a terror capable of intimidating persons of the greatest courage;<sup>d</sup> which another rule reduces to the danger of life, or torment of the body;<sup>e</sup> for it is most just and reasonable, and likewise agreeable to our practice, that, all manner of violence being unlawful, we should restrain even those acts of it that do not go to so great excess, and that reparation should be made of all the prejudice occasioned by acts of violence which engage the weakest persons to do a thing that is unjust and contrary to their interest. Which is founded likewise on some rules of the Roman law, by which all force is declared unlawful, and all acts of violence prohibited, even although they are employed to procure one's self justice.<sup>f</sup> And these rules are so essential a part of the law of nature, that there would be no order in the society of mankind, were not even the least acts of violence repressed.

## ART. I.

1247. *Definition of Force.*—By force is meant all unlawful impressions, which move any one against his will, for fear of some great evil, to give a consent which he would not give if his liberty were free from the said impression.<sup>g</sup>

## II.

1248. *Effect of Force in Covenants.*—All covenants, to which one of the parties has consented only through force, are null; and the party who has made use of force will be punished for it according to the quality of the fact, and be bound to make good all the loss and damage which he shall have occasioned.<sup>h</sup>

<sup>d</sup> L. 6, D. quod met. caus.

<sup>e</sup> L. 13, C. de trans.; — l. 8, C. de res. perp.

<sup>f</sup> L. 13, D. quod met. caus.

<sup>g</sup> L. 2, D. quod met. caus.; — l. 3, § 1, cod.; — l. 5, cod.; — l. 1, cod.

<sup>h</sup> L. 1, D. quod met. caus.; — l. 3, cod.; — l. 6, D. de of. pref.; — l. 116, D. de reg. jur.

All sort of force, all violence, and oppression, are prohibited by several ordinances.

### III.

1249. *Divers Ways of using Force.*—Although the violences offered, and the menances that are used, do not go to that extremity as to put the life in danger, yet if other unlawful means are used, such as the keeping one shut up till he grants what is demanded of him, if one exposes another to the hazard of some evil, the reasonable fear of which obliges him to give a forced consent, the said consent will be without effect; and the person who has used such unfair means to obtain it will be condemned to make good the damage, and undergo other punishments which he shall have deserved according to the circumstances. Thus, if he into whose hands were deposited papers, or other things, denies that the said things were left with him; or threatens to burn what he is bound to restore, unless the person to whom the things deposited belong give him a sum of money, or other thing, which he unjustly demands; whatever shall have been consented to in this manner will be annulled; and the depositary will be punished for his treachery, and for this exaction, according to the circumstances.<sup>c</sup>

### IV.

1250. *If a Magistrate abuses his Authority to intimidate one in order to extort a Consent.*—If a magistrate or other officer uses his authority contrary to justice, and by threatenings, or other unlawful ways, whether it be for the interest of others or his own, engages any person to give a consent, which is given purely out of fear of the evil which he is capable of doing, the consent extorted by such violence will be annulled; and the magistrate will be answerable for the damage which he shall have caused,<sup>d</sup> and be liable to the other penalties which such a misdemeanour may have merited.

<sup>c</sup> L. 8, § 1, *D. quod met. caus.*; — l. 1, *cod.*; — l. 22, *cod.*; — l. ult. § 2, *cod.* The laws do not allow private persons to make use of any violence or force whatsoever, not even to do themselves justice. And therefore much less do they permit them to use violence, to threaten, to intimidate, in order to extort a consent to an unjust pretension. See at the end of the preamble to this section the law cited under the letter f. See also the seventh article of this section, and the sixteenth article of the fifth section of *Covenants*. See also *Lev. vi. 2, 3, 4, 5*.

<sup>d</sup> L. 3, § 1, *D. quod met. caus.*; — l. ult. *C. de his quæ vi metusve c. g. s.* See the eighth section of the *Contract of Sale*, in the preamble

## V.

1251. *Violence upon other Persons than him whom they have a Mind to force to a Consent.* — If the violence, the threats, or other ways of the like nature, are used towards other persons than him, from whom they intend to extort a consent; and they intimidate him by the impression which the fear of seeing those persons exposed to any evil treatment makes upon him, as if it is his wife, his son, or any other person whose sufferings ought sensibly to affect him, the consent obtained by such means will be annulled, and the party offending be liable to damages and other penalties, according to the circumstances.\*

## VI.

1252. *What is done by Force is null, even with regard to those who did not use it.* — All that has been done by force will not only be null with respect to those who have used the force, but also with respect to all other persons who pretend to take advantage of it. For what is of itself unlawful cannot subsist in favor of any person whatsoever, even although the persons who have done the violence reap no profit by it.<sup>f</sup>

## VII.

1253. *We are to judge of the Effects of the Force by the Circumstances.* — In all cases where the question is about annulling a covenant, or any consent that is pretended to have been given out of fear of some violence, or other bad treatment, we are to judge of them by the circumstances; such as the injustice that has been done to him who pretends to have been forced, the quality of the persons, that of the menaces or other impressions; as if a woman has been in danger of her honor; if persons of a violent temper have threatened a weak person, and exposed him to some danger; if it was in the day or night-time, in a town, or in the fields. And it is by these kind of circumstances, and others of the like nature, and by the consequence of repressing all sorts of violence and unlawful means, that we are to judge of the regard that is to be had to the fear which the person who complains was in, and to the impression which the fear was capable of making upon his reason and his liberty.<sup>g</sup>

\* L. 8, § ult. D. *quod met. caus.*; — § ult. Inst. de noxal. act.

<sup>f</sup> L. 14, § 3, D. *quod met. caus.*; — l. 9, § 1, eod.; — l. 5, C. eod.

<sup>g</sup> L. 3, D. *ex quib. caus. maj.*; — l. 8, § 2, eod.; — l. ult. eod.; — l. 13, D. *quod met. caus.*  
See the third article of this section.

## VIII.

1254. *When Force is used to oblige one to comply with a Thing that is just.*—If violence has been made use of, instead of legal means, to force one to a compliance with a thing that is just, such as a debtor to pay what he owes; the persons who have had recourse to violent means will be liable to damages, and such other punishment as the violence may have deserved, and even that of the loss of the debt which shall have been exacted by such illegal courses, according as the quality of the act may give occasion thereto.<sup>a</sup>

## IX.

1255. *Counsel and Authority do not impose Force.*—The ways which have nothing of violence and injustice in them, but which make only impressions to induce people to a compliance by other lawful and honest motives, are not sufficient to annul covenants. Thus, the counsel and authority of persons, the respect due to whom engages people to a condescension, such as that of a father, a magistrate, or other persons placed in some dignity, and who interest themselves in persuading and inducing persons to enter into some covenant, without using any violence, or threatening, are motives of which the impression has nothing contrary to liberty, and which does not annul the covenants. Thus, the son who, by the father's persuasion, becomes surety for him, cannot complain as if the respect which he had for the paternal authority had engaged him to it by force. Thus, he who becomes bound to a person in great power cannot pretend that his obligation is the less valid upon that account.<sup>b</sup>

## X.

1256. *An Order of a Court of Justice is not Force.*—Whatever is done in obedience to the authority of justice, and to the order of a judge within the bounds of his ministerial function, cannot be pretended to be done by violence; for reason demands

<sup>a</sup> L. 12, § 2, *D. quod met. caus.*; — l. 13, in *f. eod.*; — l. 9, *C. de oblig. et act.* See the remark on the third article of this section.

<sup>b</sup> L. 6, *C. de his que vi metusve c. g. s.*; — v. l. 2, *C. ne fiscus vel resp.*; — v. l. 26, § 1, *D. de pign.* We see by this law, that we are not to understand indefinitely that other rule which says that we ought not to take that to be the will of a son which he does in obedience to the will of his father. *Velle non creditur qui obsequitur imperio patris.* L. 4, *D. de adop. jura*

that we should pay obedience to those who are in authority over us.<sup>1</sup>

### SECTION III.

#### OF FRAUD AND STELLIONATE.

**1257. *Stellionate*.** — *Stellionate* is distinguished from fraud in general; for although it be but a kind of fraud, yet it hath its proper name. The word *stellionate* hath its rise in the Roman law, where the Romans distinguished by the name of *stellionatus* all such cheats, impostures, and other criminal frauds which had no proper name of their own. But they chiefly gave this name to that kind of fraud or crime which those persons are guilty of, who, having sold or mortgaged a thing to one person, sell it to another, without telling him any thing of the first engagement.<sup>a</sup>

**1258.** It is in this last meaning that we take the word *stellionate*, restraining it to that kind of fraud where persons who, having sold, transferred, or mortgaged a certain thing, afterwards sell, transfer, or mortgage it to another, without acquainting him with the first engagement; which is such a character in fraud as to make it amount to a crime, and which is restrained by punishments according to the circumstances.

#### ART. I.

**1259. *Definition of Fraud*.** — By fraud is meant all surprise, trick, cunning, dissembling, and other unfair way that is used to cheat any one.<sup>a</sup>

#### II.

**1260. *Fraud is judged by the Quality of the Fact, and the Circumstances*.** — The ways of cheating being infinite, it is not possible to reduce into a rule what fraud is sufficient to annul a covenant, or to give occasion for recovering damages, and what are the cunning artifices which the law connives at. For some of them go unpunished, and do in no way invalidate covenants; and others

<sup>1</sup> L. 3, § 1, *D. quod met. caus.* See the thirteenth section of the *Contract of Sale*, concerning forced sales.

<sup>a</sup> L. 3, § 1, *D. stellion.*

<sup>a</sup> L. 1, § 2, *D. de dolo*; — l. 7, § 2, *D. de pact.*

annul them. Thus, in a contract of sale, what the seller speaks at random, to set off the merchandise which he sells, although very often contrary to truth, and consequently against justice, is not reputed to be such a fraud as is sufficient to annul the sale, if they be only such cunning artifices as the buyer may easily guard himself against, and on which the sale doth not depend. But if the seller declares a quality of the thing which he sells, and thereby engages the buyer to purchase it; as if he sells a land or tenement, with a right of service which is not due to it; this will be a fraud sufficient to annul the sale. Thus, in all cases where the question is to know if there be any fraud, it depends on the prudence of the judge to find it out, and to punish it, according to the quality of the fact and the circumstances. And as we ought not, on the one hand, easily to annul covenants, for every thing that may not be within the bounds of a perfect sincerity; so, on the other, we ought not to suffer simplicity and honesty to become a prey to double-dealing and knavery.<sup>b</sup>

### III.

1261. *Fraud is never presumed, but ought always to be proved.*— Seeing fraud is a kind of crime, it is never presumed if there be no proof of it.<sup>c</sup>

### IV.

1262. *Difference between Personal Fraud and that which is called Dolus re ipsâ.*— We must distinguish the fraud mentioned here from the damage which happens without the act of the parties contracting. As if, in the partition of an estate, one of the parties happens to be aggrieved by an excessive valuation of what falls to his share, or if a purchaser is wronged by some vice in the thing sold, although the seller was ignorant of the said vice. It is this damage, without the fraud of any person, which is called *dolus re ipsâ*, because one of the contractors happens to be cheated by the thing itself, without any fraud on the part of the other.<sup>d</sup> But personal fraud, which is that treated of under this title, implies a design of one of the contractors to cheat the other, and the actual

<sup>b</sup> L. 1, § 1, *D. de dolo*; — l. 1, § 2, *D. de doli mali et met. except.*; — l. 1, *D. de dolo*; — l. 35, *D. de dolo*; — l. 59, *D. de edil. ed.* See the twelfth article of the eleventh section of the *Contract of Sale*.

<sup>c</sup> L. 6, *C. de dolo*.

<sup>d</sup> L. 36, *D. de verb. ob.* See the ninth article of the sixth section of *Covenants*.



accomplishment of the cheat.\* As if a son, concealing his father's testament, transacts with a creditor who had lost the title or voucher of the debt owing to him, which the father had owned in his testament to be a just debt, and makes the creditor by this means lose his debt. There is this difference between these two kinds of wrong, that that in which there is no personal fraud barely annuls the covenants, and entitles the party to damages, if there be room for it;† whereas personal fraud may sometimes be punished, according to the circumstances.

## V.

1263. *Definition of Stellationate.* — Stellationate is that sort of fraud which is practised by him who assigns, sells, or mortgages the same thing which he had already assigned, sold, or mortgaged to another, and who conceals the former engagement.‡ And he likewise is guilty of stellationate who pawns one thing instead of another, if it is of less value,§ such as copper instead of gold; or who pawns a thing that is not his own.¶

## VI.

1264. *Exception to the former Rule.* — If the thing which is pawned or mortgaged to a second creditor, after it has been pawned or mortgaged to a former, be sufficient to satisfy both, then it will not be reckoned stellationate.¹

## VII.

1265. *The Effects of Stellationate.* — Stellationate not only annuls the covenants in which it is found; but it is, moreover, restrained and punished according to the circumstances.ᵐ

\* L. 10, § 1, *D. quæ in fraud. cred.*; — l. 1, in f. *D. de statu lib.*; — l. 79, *D. de reg. jur.*

† See the sixth article of the eleventh section of the *Contract of Sale*.

‡ L. 3, § 1, *D. stell.*; — l. 1, *C. eod.*

§ L. 36, *D. de pign. act.*

¶ L. 36, § 1, *eod.* See the following article.

¹ L. 36, § 1, *D. de pign. act.* We do not look upon it as stellationate where a debtor mortgages his whole estate to divers creditors, nor even where the same land or tenement is mortgaged to several persons, provided the debtor be otherwise solvent. But we are to judge by the circumstances which may have engaged the creditor, whether he be cheated or not.

ᵐ L. 3, § 2, *D. stell.*

## SECTION IV.

## OF UNLAWFUL AND DISHONEST COVENANTS.

## ART. I.

1266. *Two Sorts of Unlawful Covenants.* — Unlawful covenants are those which are contrary to law. And as there are two kinds of laws, the law of nature and the positive law of man, so there are likewise two kinds of unlawful covenants; to wit, those which are contrary to the law of nature and good manners, and those which transgress the positive law of man. Thus, it is against the law of nature and good manners to treat about the committing of a robbery or a murder; and these sorts of covenants are in themselves criminal and always null.<sup>a</sup> Thus, it is against the positive law of man to sell to strangers certain kinds of merchandises, when such commerce is prohibited by some particular law.<sup>b</sup>

## II.

1267. *In what Respect a Covenant is contrary to Law.* — We ought not to place without distinction in the number of unlawful covenants, as being contrary to law, all those in which the parties agree on something contrary to a law; but only those which are against the spirit and intention of the law, and which are such as are forbidden by the law. Thus, this covenant, wherein it is agreed that the seller shall only warrant his own acts and promises, makes between the seller and buyer a rule contrary to that of the law, which ordains that the seller shall warrant the thing sold against all evictions whatsoever. But that agreement is nevertheless lawful; for, this law being made only in favor of the purchaser, he may renounce what the law hath enacted for his benefit; and this the laws do not prohibit.<sup>c</sup>

## III.

1268. *Unlawful Covenants liable to Punishment.* — Unlawful covenants are not only null, but are also liable to punishment.

<sup>a</sup> L. 6, C. de pact.

<sup>b</sup> See the ninth article of the ninth section of the *Contract of Sale*.

<sup>c</sup> L. 29, C. de pact.; — l. 1, § 10, D. de oper. nov. nunt. See the twenty-seventh article of the second section of the *Rules of Law*.

according as they transgress the prohibition and spirit of the law.<sup>d</sup>

## IV.

\* 1269. *Effect of Unlawful Covenants.* — Unlawful covenants oblige to nothing, except to make good the damage which they occasion, and to suffer the punishments which the persons may have deserved who made them.<sup>e</sup>

## V.

1270. *When one may or may not recover what is unjustly given.* — If the covenant is unlawful only on the part of him who receives, and not of him who gives, as if a depositary demands money for restoring the thing deposited with him, or a thief for giving back what he has stolen, he who has given money on such an account may demand it back, although the receiver have performed his agreement.<sup>f</sup> But if the covenant be unlawful both on the part of the giver and receiver, as if one who has a lawsuit depending gives money to the judge to engage him to give judgment in his favor; or if one person gives money to another to engage him to do an evil action; he who has given the money is justly stripped of what he has laid out on such an account, and he cannot recover it. And he who received the money cannot reap the profit of the price of his crime; but both the one and the other will be chastised by making restitution, and undergoing the punishments which they shall have deserved.<sup>g</sup>

<sup>d</sup> Legis virtus hæc est, imperare, vetare, permittere, punire. L. 7, D. de legib.

<sup>e</sup> This is a consequence of the foregoing article.

<sup>f</sup> L. 1, § ult. et l. 2, D. de condict. ob turpem vel injust. caus.; — l. 5, C. eod.

<sup>g</sup> L. 3, D. eod. We do not insert in this article what is said in some laws, that, in the cases where the covenant is unlawful on both sides, the condition of the receiver is better than that of the giver; the meaning of which is, that the receiver is not made to restore what he has received, and that in this sense his condition is the most advantageous. Si et dantis et accipientis turpis causa sit, possessorem potiorum esse. Et ideo repetitionem condare. L. 8, in f. D. de condict. ob turp. caus.; — l. 2, C. eod.; — l. 9, D. de dol. mal. et met. except. It is neither justice nor reason that makes the receiver's condition better; on the contrary, it is both just and reasonable that he should be chastised, not only by depriving him of such a gain, but likewise by the other punishments which he may have deserved. And we see likewise that in the same body of the Roman law where these laws are found, there is another law which enacts that those who receive money to create trouble to one, to bring an action against him, or to accuse him of a crime, or to assist from so doing, shall be made to restore fourfold what they have received. V. l. 1, in prin. D. de calumniat.; — d. l. § 1.

## BOOK II.

### OF ENGAGEMENTS WHICH ARE FORMED WITHOUT A COVENANT.

1271. *The Subject-Matter of this Second Book.* — We have explained, in the *Treatise of Laws*,<sup>a</sup> the origin and nature of the several sorts of engagements which God produces among men, the better to link them together in society; and we have endeavoured to discover in those sources the principles and spirit of the laws which relate to the same engagements. For since God hath made the society of mankind essential to their nature, that he might employ them in the duties of mutual love, which he enjoins them by the second law; it is by the engagements under which he puts them that he determines every one to the particular duties which he has a mind to prescribe to him. So that it is from the nature of those several engagements that we must discover their respective rules, and particularly the rules of such engagements as are the subject-matter of the civil law.

1272. In order to a more particular inquiry into the several matters treated of in the civil law, we have made a plan of them,<sup>b</sup> in which we have distinguished two kinds of engagements. One is of those which are formed by the mutual will of two or more persons in covenants; and it is this kind which has been the subject-matter of the first book. The other is of those engagements which are formed without the mutual will of the parties, but only either by the act of him who engages himself without the participation of the person to whom he is engaged, or even without the will of either of the parties, and by a bare effect of the divine providence. And it is this second kind of engagements without a covenant, which we shall treat of in this second book.

<sup>a</sup> Chap. 1, n. 8; ch. 2, n. 3; ch. 3; ch. 4.

<sup>b</sup> *The Treatise of Laws*, chap. 14.

1273. It will be easy to discern, by the bare reading of the table of the titles of this book, the engagements which are formed by the will of one person alone, from those which God produces independently of the will of both parties.

1274. The engagements which are formed by the will of the person alone who engages himself have this in common with the engagements that are formed by covenants, that, both the one and the other sort having for their cause the will of persons, there may be some of them which may not be just, and which may be contrary to law or good manners; and in these engagements the parties lay themselves under no other obligation than that of repairing the evil that is done by them.\* But the engagements which have only for their cause the divine providence, and which are independent on our wills, such as guardianships, public offices, and those which are formed by accidents, and by events brought to pass by God, without our participation, can have nothing in them that is unjust. And it is the hand of God, by which they are formed, that points out in every one of them what is the duty they oblige us to. Thus, whereas the greatest part of men, looking on these engagements, when they are painful and unprofitable, as being only a grievous and heavy yoke, contrary to their interests and inclinations, shake them off as much as they can with impunity; they ought, on the contrary, to reverence in them that order of God which is a law to us, and to execute it with that fidelity and carefulness which we owe to whatever he commands.

1275. Of all the engagements which are formed without a covenant, that of the greatest importance, which comprehends in it the greatest number of duties, and which demands the greatest fidelity, is the engagement of tutors; and it is also a matter that is amply discussed in the Roman laws; wherefore we have thought fit to make it the first title of this second book; and we shall afterwards treat of the other engagements in their order.

\* See the preamble of the title of the *Vices of Covenants*, and the third and fourth sections of the same title.

## TITLE I.

## OF TUTORS.

1276. *Necessity of Guardianships.* — It is equally for the benefit of religion and civil government, that those who are deprived of their fathers, before they come to an age in which they may be capable of governing themselves, should be put, till they arrive at such age, under the conduct of some person who may be to them instead of a father, as much as is possible, and who may take upon himself the care of their education and the management of their estates. And it is to the persons who are called to this office that we give the name of *tutors*, or guardians. It is not necessary to explain here what that state is which we call minority, during which persons are under tuition or guardianship, and how long it lasts. The reader may have recourse to what has been said on this subject in the *Treatise of Laws*, the eleventh chapter, No. 9, and in the title of *Persons*, Sect. I. art. 16, and Sect. II. art. 8 and 9.

1277. *The Nature of this Engagement.* — The engagement of tutors or guardians is among the number of those which are formed without a covenant; for it obliges those who are called to that office, whether they will or not, by a just effect of the order of society among men, which does not permit that orphans should be abandoned. Thus, this duty naturally falls on those that are their nearest of kin, both because their relation engages them to it more strictly, and because the care of the estates of minors belongs properly to those whom the law calls to succeed them, if there are no causes which may excuse them from accepting the said office, or if they are under no incapacities which may exclude them from it. As the tutor is obliged, without his will, to take care of the person and estate of the minor, so it is likewise just that the minor, on the other hand, should be reciprocally bound to the tutor, to ratify, after he is come to age, whatever the tutor shall have rightly managed, and to allow him the expenses which he shall have reasonably laid out. So that the guardianship makes a reciprocal engagement between the tutor or guardian and the pupil, in the same manner as if they had contracted with one another. And it is for this reason that this engagement is called in the Roman law a *quasi contractus*, that is, like to an

engagement produced by a contract between persons who treat together.<sup>a</sup>

1278. *Difference between our Usage and the Roman Law as to Tutorships or Guardianships.*—Before we proceed to the explanation of the rules relating to tutorships or guardianships, it is necessary to remark on this subject some differences between our usage and the Roman law; for without the knowledge of these differences the reader would be perplexed, in many articles, about the application of the rules which are here quoted.

1279. The first of these differences consists in this, that by the Roman law tutors were given only to males under the age of fourteen years, and to females under the age of twelve; and not to persons that were above that age; and the tutorship ended when the pupils attained to the said respective ages of twelve and fourteen, which were called puberty. As to adult persons, or those who were arrived at the age of puberty, they had only curators assigned them till they accomplished the age of five-and-twenty years, which was the full majority, according to the Roman law. And even the said curators were given only in two cases: one, when the minors themselves agreed to it;<sup>b</sup> and the other, when the persons who had matters to settle and adjust with the minors procured curators to be assigned them, that they might prosecute against the said curators the actions which they had against the minors.<sup>c</sup> But the tutor was discharged by the puberty of his pupil, and could not so much as be named his curator if he declined it.<sup>d</sup> He was obliged only, after his tutorship was at an end, to put the minor in mind to ask for a curator, and if he had affairs of the minor in his hands that were not finished, he was to take care of them till there was a curator appointed to succeed him.<sup>e</sup> In France the tutorship lasts till the persons have fully completed the age of five-and-twenty years. For according to our usage, as

<sup>a</sup> V. l. 5, § 1, *D. de oblig. et act.*; — § 2, *Instit. de obl. quæ ex quasi contr.* See in the same places, other kinds of quasi contracts among coheirs or co-executors; between the executor and the legatee; between him who manages the affair of an absent person, and the said absent person; between those who happen to have any thing belonging to them in common without a covenant; and between him who receives that which is not his due, and the person to whom he must restore it. All these matters shall be treated of in their proper places.

<sup>b</sup> § 2, *Instit. de curat.*

<sup>c</sup> *D.* § 2, l. 2, § 3, *P. qui petant tutores*; — l. 1, *Cod. eod.*

<sup>d</sup> L. 20, *Cod. de excus. tut.*

<sup>e</sup> L. 5, § 5, *D. de adm. et per tut.*; — l. un. *Cod. ut caus. post. pub. adit. tut.*

well as by the Roman law, it is only after the completion of this age that persons are held to be capable of all sorts of engagements, without hopes of being relieved against them in consideration of their age. So that in this title, therefore, we shall only make use of the name *tutor*, both as to those minors who are under the age of puberty, and those who are above it, and who are called adults, although in the laws which shall be quoted the words *tutor* and *curator* must be understood in the sense which they had in the Roman law.

1280. We must observe, as a second difference between our usage and the Roman law, that by the Roman law certain persons were called to tutorships preferably to all others, such as those who had been named by the father in his testament, and for want of such nomination the next of kin,<sup>1</sup> and if there were many in the same degree of kindred, they were all called together. But in France the usage is, that the relations of the minor are called to appear before the judge who has the appointment and nomination of the tutor, in order to see such tutor assigned, and they do not implicitly follow the will of the father who had nominated a tutor by his testament, nor the order of the proximity of blood. But the relations are at liberty to make another choice, if they think there is occasion for it. And this liberty takes place, not only in the cases where the persons, whom the proximity of blood would call to the tutorship, should have just grounds of being excused from it, or should be incapable of it, but it is made use of to discharge very often the next of kin, who have no legal excuses to offer why they should be exempted from it. And it is for this reason that in France all tutorships are said to be *dative*; and although this usage is founded on a principle of equity, because in reality it may so happen that the next of kin, who has not, perhaps, sufficient excuses to exempt him from the tutorship, may not have the qualifications that are necessary to make a good tutor; yet this liberty is very often turned to a bad use, and the nearest relations, who often have not the good of the minors so much in their view as to get themselves delivered from the burden of the tutorship, contrive, by their intrigues, to get it settled on the remotest relations; which is an abuse that ought to be corrected, by some proper regulation for that purpose.

<sup>1</sup> L. 1, *D. de testam. tut.*; — *Instit. de leg. ggn. tut.*; — l. 1 et l. 6, *D. de leg. tut.*; — *Nov. 118, cap. 5.* See the eighth article of the first section.



1281. The third difference between our usage and the Roman law consists in the manner of appointing tutors to minors. For seeing there was not in Rome any public officer who did the functions which in this kingdom are performed by the king's proctors in the respective jurisdictions, it was required that the mothers of the minors, their relations, their friends, or their *libertines*, that is, those who had been set at liberty from slavery by the ancestors of the minors, should apply to the magistrates to have tutors assigned them.<sup>a</sup> But in France it is the duty of the king's proctors, and of those who perform the functions of that office in the inferior courts of lords of manors, to see that minors have tutors assigned them; and the mothers, or relations, who have a mind to see that due care be taken of it, may apply to the said officers for their assistance in this matter.

1282. As to the other differences which may happen to be between our usage and the Roman law, they shall be taken notice of in their proper places, and it is not necessary to say any thing of them here.

## SECTION I.

### OF TUTORS, AND OF THEIR NOMINATION.

#### ART. I.

1283. *Definition of Tutorship.*—The tutor is he to whom is committed the care of the person and estate of the minor. And this office is called tutorship or guardianship;<sup>a</sup> that is, an engagement to take that care.<sup>b</sup>

#### II.

1284. *Duration of the Tutorship.*—The minor is he who has not as yet five-and-twenty years complete.<sup>c</sup> And those who are under the said age when their fathers die, being in that state which is called infancy or minority, are put under tuition while the said state lasts.<sup>d</sup>

<sup>a</sup> Tit. D. qui petant tutores.

<sup>a</sup> § 2, *Inst. de tutel.*; — l. 1, § 1, *D. eod.*

<sup>b</sup> §§ 1 et 2, *Inst. de tut.*; — l. 1, *D. eod.*; — l. 1, § 1; — l. 14, *D. de test. tut.*; — l. 12, § 3, *D. de adm. et per. tut.*

<sup>c</sup> L. 3, § 3, *D. de minor.* See, touching the bissextile, the twentieth article of the first section of the *Rescission of Contracts.*

<sup>d</sup> *Inst. de curat.* See the remark in the preamble to this title, concerning the difference

### III.

1285. *The nearest Relations ought to be appointed Tutors, if there is no Reason to the contrary.*— Although it be natural to name for the tuition of a minor him whom the nearness of blood calls to be the minor's heir and successor; yet seeing that it may often happen that the nearest relations are either incapable of being tutors, or have lawful excuses for declining the said office, we may name for tutors relations of a remoter degree,<sup>e</sup> or, in default of relations, those who are allied by marriage, and even strangers, if there be no relations or allies who can be named, that is, who are capable of being tutors, and who have no lawful excuse for declining the office. And if, in the place where the pupil resides, there be no person fit to be tutor, one may be chosen out of the neighbouring places.<sup>5</sup>

### IV.

1286. *Nomination of the Tutor by the Father or Mother.*— Fathers<sup>h</sup> and mothers<sup>i</sup> may name tutors to their infant children. But although their choice be a presumption of the capacity and solvency of the person whom they have named, yet others may be named in their place, if there be any cause which requireth the making of another choice. For it may happen, either that the father has made a bad choice, or that some change hath afterwards happened either in the morals or substance of the person whom he has named.<sup>1</sup>

### V.

1287. *One or more Tutors may be named.*— We may name to only one minor one or more tutors, if his condition and the largeness of his estate require the administration of several persons.<sup>m</sup> And the tutors manage either jointly together the whole estate of the minor, or each of them apart that which is separately commit-

between those who are under puberty and those who are adult, and the duration of the tutorship.

<sup>e</sup> L. 1, D. de leg. tut.

<sup>f</sup> L. 1, § 1, D. de leg. tut.

<sup>5</sup> L. 24, D. de tut. et cur. datis; — l. 1, § 10, D. de mag. conv.; — l. 32, D. de testam. tut. See the twenty-fifth article of the seventh section.

<sup>h</sup> L. 1, D. de testam. tut.

<sup>i</sup> L. 4, § 1, eod.

<sup>1</sup> L. 10, D. de conf. tut.; — l. 3, § 3, D. de adm. et per. tut.

<sup>m</sup> L. 27, D. de tut. et cur. dat.; — l. 3, D. de adm. et per. tut.; — d. l. § 1; — l. 24, § 1, eod.

ted to his charge, according to the rules which shall be explained in its proper place.<sup>a</sup>

## VI.

1288. *Tutors Honorary and Tutors Onerary.*—Beside the tutors who are commonly given to minors of all conditions for the management of their affairs, sometimes others are named, who are called *honorary* tutors, when the condition of the minor deserves it. And their function is to watch over the administration of those tutors who act, and to advise them; and for distinction's sake, the tutors who have the burden of the actual management of the minor's concerns are called *onerary* tutors.<sup>o</sup>

## VII.

1289. *Tutors ought to be confirmed by the Judge.*—All tutors, whether they be named by the father or mother of the minor, or whether they be called to the office by proximity of blood or be otherwise chosen, ought to be judicially confirmed by the judge of the guardianship; that is, the judge of the place where the minor hath his residence.<sup>p</sup>

## VIII.

1290. *Tutors with Surety, or without it.*—The nomination of tutors may be made two ways, as to what concerns the safety of the minor's estates. One is, when those who name them inform themselves well of the solvency of the tutors, without obliging them to give security: and the other is, when the tutors are not admitted to the tutorship or guardianship without giving security;<sup>q</sup>

<sup>a</sup> See the twenty-eighth article of the fifth section.

<sup>o</sup> *L. 14, § 1, D. de solut.*; — *l. 26, § 1, D. de test. tut.*; — *l. 3, § 2, D. de adm. et per. tut.* See the thirty-first article of the third section.

<sup>p</sup> *L. un. C. ubi per. tut.*; — *v. toto tit. D. de confirm. tutor. et tit. Inst. de Atil. tut.* In France the judge does not name the tutor, nor confirm him whom the father has named, but by the advice of the friends and relations. *V. l. ult. §§ 1 et 2, C. de adm. tut.*, where mention is made of taking the advice of the relations in naming a curator for a lawsuit.

<sup>q</sup> (*Legitimos tutores*) *cogi satisfacere certum est. L. 5, § 1, D. de legit. tut.* *Nonnamquam satisfactio ab eis non petitur. D. l. § 3.* These texts respected only the tutors who were called by proximity of blood. For the tutors who were named in the father's testament were not obliged to give security. *L. 17, D. de test. tut.* It is an easy matter to perceive the reason of this difference which the Roman law made between these two sorts of tutors. According to our usage, no tutor is obliged to give security. But it may sometimes happen, in a competition about the tutorship or guardianship, that those who put in for it, although they were not bound to give security, do nevertheless offer it of their

which takes place only with respect to those who are willing to accept the tutorship or guardianship on that condition.

## IX.

1291. *Preference of the Tutor who offers to give Security.*—If, of two or more persons who are named tutors, one offers to give security and the others make no such offer, he who offers to give security shall be preferred,<sup>r</sup> if there is no reason for preferring another, either on the account of morals or for other causes.

## X.

1292. *The Father or Grandfather Tutor.*—The father hath the administration of the goods of his children; with respect to which he is not them instead of a tutor by law.<sup>a</sup>

## XI.

1293. *Who may be Tutors.*—All persons may be named tutors, who are not under some incapacity, or who have not some lawful excuse for being exempted from the said office;<sup>t</sup> so that it is only necessary to know who are the persons that are by law declared incapable of the office of guardianship, or exempted from it. And this shall be the subject-matter of the seventh section.

## XII.

1294. *The Tutor takes an Oath of Faithful Administration.*—The tutor being named, he takes an oath in court faithfully and truly to execute the said office, and to procure on all occasions the good of the minor.<sup>a</sup>

own accord, because of the interest which they may have in the preservation of the effects belonging to the estate; the said offer giving them the preference before others who might be called to the tutorship, and who might be less solvent. See the following article, and the thirteenth article of the third section.

<sup>r</sup> L. 17, § 1, *D. de test. tut.*; — l. 13, in fine, *D. de tut. et curat. dat.*; — l. 21, § 5, *D. eod.* See the thirtieth article of the third section.

<sup>t</sup> L. 5, *C. de dolo*; — *Inst. de leg. per. tut.*; — l. 7, *C. de cur. fur.* See the fifth article of the first section of *Curators*.

<sup>a</sup> L. 1, § 3, *D. de excus.*

<sup>a</sup> *Novell. 72, c. ult.*; — v. l. 7, § 5, *C. de curat. fur.* See the first article of the second section of *Curators*.

## SECTION II.

## OF THE POWER OF TUTORS.

1295. *Tutorship or Guardianship is a General Engagement.*— It is to be remarked in general, on this and the following sections, that, the office of a tutor extending to all that concerns the government of the person or management of the estate of the minor, it comprehends all that variety of engagements which the affairs of all kinds which may fall out render necessary. And this distinguishes tutorship or guardianship from the particular engagements that are formed; for example, either by sale, by letting to hire, by a loan, by a deposit, and others of the like nature. For whereas those engagements have their limits, regulated by their nature, the variety of things that fall under the administration of tutors makes their engagement to be general and indefinite.\* We shall explain in this and the following sections the rules which relate to the administration of tutors, their engagements, and the power which they have by law.

1296. *Tutors ought to take Advice of the Relations of their Minors.*— It may not be amiss to observe here how proper it is for tutors to consult with the relations of their minors, as to the manner and method of their education, the laying out of their money, the management of their affairs, the regulating their expenses of all kinds, and in every thing else in the exercise of their tutorship that may admit of any difficulty.

1297. In France it is the constant custom and usage to name a certain number of relations of the minor, or other persons, whose advice the tutor is<sup>a</sup> obliged to take, and to govern himself by their counsel; and it is upon the deliberations and counsels of the said persons that the judge examines into the conduct of the tutors, and that he allows or disallows their expenses which may be liable to any exception. And in matters of the greatest importance, such as the marriage of minors, the alienation of their immovables, and other affairs of consequence, it is usual in France to assemble before the judge, either the persons who are appointed for the ordinary counsel of the tutor, or a greater number of relations, to give their advice in such matters, which may serve as a rule to the tutor.

\* L. 38, D. depos. See the last article of the first section of *Partnership*

1298. We see some footsteps of this in the Roman law itself, that in certain cases the magistrate did, of his own accord, and by virtue of his office, take the advice of the relations, either touching the education of the minor, when there happened to be any difficulty in it, or concerning the alienation of any part of his estate.<sup>b</sup> And there is, likewise, in the Roman law an example of a council appointed to the tutor by the father of the minor.<sup>c</sup> But our usage with respect to the council of the tutor is different, and extends in general to his whole administration; and it is according to this usage that we are to interpret the rules which relate to the power of tutors.

### ART. I.

1299. *The Function of a Tutor.*—The tutor being named to be in the place of a father to the minor, his office implies two general obligations; one relates to the government and education of the person of the minor; and the other concerns the administration and care of his estate. Thus, the law gives to the tutor the power and authority that are necessary for these functions,<sup>a</sup> and obliges him likewise to discharge them with that exactness and fidelity which such a trust requires.<sup>b</sup>

### II.

1300. *The Power and Authority of the Tutor.*—The power and authority of the tutor extend to every thing that may be necessary for the right use of his administration; and the laws consider him as a father of a family, and even give him the name of master. But he is only to administer as a good and careful husband, and is bound to give an account of the use which he shall have made of the power that is given him.<sup>c</sup>

### III.

1301. *The Expenses which the Tutor may lay out.*—The tutor may lay out all expenses that are necessary, useful, or decent, for the affairs of the minor, for repairs, for the charges of lawsuits, for

<sup>b</sup> L. 1, C. ubi pup. educ. debeat;—l. 5, § 11, D. de reb. cor. qui sub. tut.

<sup>c</sup> L. 5, § 8, D. de adm. et per. tut.

<sup>a</sup> L. 1, D. de tut.;—§ 1, Inst. eod.

<sup>b</sup> See the rules of this and the two following sections.

<sup>c</sup> L. 10, D. de adm. et per. tut.;—l. 27, eod.;—l. 157, D. de reg. jur.;—l. 7, § 3, D. de emplo.

a journey, and on other such like occasions, according as the quality of the minor's estate, the nature of affairs and circumstances, may require. And in case there be any doubt about the usefulness or necessity of the expenses, he ought to get them regulated by the judge.<sup>d</sup> But the expenses cannot exceed the revenue or income, unless it be in cases of great necessity for the good of the minor.<sup>e</sup>

#### IV.

1302. *Administration of Affairs.*—The administration of the tutor reaches to every thing that is necessary or useful to the minor. Thus, he may pay off the debts owing by the minor, if they be clear and liquidated, he may acquit the charges, call in the debts that are due to him, and make the necessary repairs. But he cannot alienate the immovable goods of the minor except for necessary causes, such as the discharging of debts, if they are pressing or burdensome; and that only when the ready money, the rents, the debts owing to the minor, and his other movable effects, are not sufficient to discharge what he owes. In which case, the alienation is to be made after a judicial inquiry into the matter, by the advice of the relations, after the tutor has given in a statement of the minor's effects, by a short inventory and account, and after the sale has been judicially decreed, in which the formalities prescribed in such sorts of sales are to be observed.<sup>f</sup>

#### V.

1303. *The Extent and Limits of the Power of the Tutor.*—The tutor may always make the minor's condition better, may accept in his name gifts that will not be burdensome to him, may transact in such a manner that the minor, if he be a creditor, may preserve his debt, and if he be debtor, may find his account either in the diminution of the debt, or in the ease of payment. But the tutor cannot give away the goods of the minor, nor transact so as to lose or diminish any right belonging to him, nor lay new burdens, such as services, on the lands or tenements; neither can he

<sup>d</sup> L. 3, C. de adm. tut.; — l. 1, § 9, D. de tut. et rat. distr.; — l. 1, § 4, D. de contr. tut. et ut. act.

<sup>e</sup> L. 3, D. de cont. tut. et ut. act. See the two following articles.

<sup>f</sup> L. 27, D. de adm. et per. tut.; — l. 14, § 1, D. de solut.; — l. 46, § ult. D. de adm. et per. tut.; — l. 6, C. de præd. et al. red. min.; — l. 1, § 2, D. de reb. cor. qui sub. tut.; — l. 11, eod.; — l. 5, § 9, eod.; — d. l. 5, § 11. See the twenty-fourth and the following articles of the second section of the *Rescission of Contracts*

begin to prosecute a lawsuit that is not well grounded, nor refer a debt to the debtor's oath, unless there be no possible way of proving the debt, and this be the only remedy that is left; and, in a word, he cannot, in any thing make his pupil's condition worse.<sup>8</sup>

## VI.

1304. *Of the Tutor who makes a Bad Use of his Power.*—If the tutor abuses his power, whether it be through fraud and knavery, or through some fault, he shall be answerable for it; as if he omits to take counsel in an affair that requires it, if he makes a bad purchase, being prevailed on by bribery and favor, or if he commences or carries on a suit that is ill founded.<sup>h</sup>

## VII.

1305. *If the Father has ordered the Tutor to follow the Mother's Advice.*—If the minor's father had ordered the tutor to govern himself, in the management of his son's concerns, wholly by the advice of the mother, and that in that case he should not be accountable for the event, he would nevertheless be made answerable for what he had wrongfully transacted by the mother's advice, if the same was imprudent. But if the advice was reasonable, nothing could be laid to the tutor's charge for having followed it.<sup>i</sup>

## VIII.

1306. *In what Manner the Tutor acts by the Minor.*—The tutor exercises his power in the affairs of the minor two ways. One is by authorizing his minor to act when he is present; and the other is by acting as tutor, whether the minor be present or not. In both which cases he is responsible, both for what he authorizes, and for what he does.<sup>j</sup>

<sup>8</sup> L. 40, § ult. *D. de adm. et per. tut.*; — l. 22, *eod.*; — l. 3, § 5, *D. de reb. cor. q. s. t.*; — l. 8, *C. de adm. tut.*; — l. 35, *D. de jurejur.*; — v. l. 17, §§ 1 et 2, *eod.* See the fifth article of the second section of *Covenants*. See the tenth article of this section. See the second article of the second section of *Novations*.

<sup>h</sup> L. 7, § 2, *D. de adm. et per. tut.*; — l. 57, *eod.*; — l. 6, *C. eod.* See the ninth and eleventh articles of the third section.

<sup>i</sup> L. 5, § 8, *D. de adm. et per. tut.*

<sup>j</sup> L. 1, § 2, *D. de adm. et per. tut.*; — v. d. l. §§ 3 et 4. See the ninth article of the third section.



## IX.

1307. *Effects of the Tutor's Authority.* — The power and authority of the tutor have this effect, that whatever he does is considered as the proper act of the minor. And whether he obliges himself for the minor as his tutor, or whether others oblige themselves to him in this quality, and whether he obtains judgment against others, or judgment passes against him, it is the minor that becomes thereby creditor or debtor, and the obligations and condemnations have their effect for or against him.<sup>m</sup>

## X.

1308. *Restitution of the Minor notwithstanding the Tutor's Authority.* — If the minor has suffered considerable loss by what the tutor has transacted even honestly and uprightly, whether with or without the minor's concurrence, the authority of the tutor will be no hindrance why the minor may not have relief in this case, if there be ground for it,<sup>n</sup> according to the rules which shall be explained in the title of *Restitution of Things to their First State*. For the tutor has only power to preserve the estate of the minor, and not to waste it.

## XI.

1309. *In an Affair between the Tutor and the Minor another Tutor is substituted.* — If the tutor hath in his own name any claim against his minor, he cannot authorize him in any thing relating to his own concern. But in this case a curator or substitute tutor is given to the minor, who is to defend him against the pretensions of his tutor. If the minor has two or more tutors, then one of the tutors shall defend him against the other. But if the business were to authorize the minor to accept, for instance, an inheritance that is not burdensome, to which the tutor happens to be a creditor, the tutor may authorize his minor to accept of the inheritance, although, by a consequence of the engagements which he enters into by taking upon him the quality of heir, he becomes debtor to his tutor.<sup>o</sup>

<sup>m</sup> L. 2, D. de adm. et per. tut.; — l. 7, D. quando ex jure tut.; — l. 3, C. quando ex fac. tut.; — l. 3, D. quando ex fact. tut. See the following article.

<sup>n</sup> L. 7, § 3, D. pro emp.; — l. 2, D. de auct. et cons. tut.; — l. 2, si tut. vel cur. interu. See the nineteenth article of the second section of *Rescissions*.

<sup>o</sup> L. 1, D. de auct. et cons.; — l. 5, cod.; — l. 3, § 2, D. de tutel.; — l. 1, C. de in lit. dand. tut.; — v. Nov. 72, c. 2; — l. 24, D. de test. tut.; — l. 1, D. de auct. et cons. tut. — l. 7, cod.

## XII.

1310. *The Tutor cannot accept an Assignment of a Debt owing by his Minor.* — The tutor cannot accept an assignment of a debt owing by his minor; and if he does, he shall lose<sup>a</sup> the debt that is assigned; unless the circumstances justify what he does, as if the tutor pays a debt with his own money, that he may put a stop to or prevent an attachment of the goods of the minor.<sup>a</sup>

## SECTION III.

## OF THE ENGAGEMENTS OF TUTORS.

## ART. I.

1311. *The Tutor is obliged to act.* — He who has been named tutor, and who has no excuse, is obliged to accept and execute the tutorship. And he shall be accountable, not only for what he has managed ill, but also for what he has omitted to do.<sup>a</sup>

## II.

1312. *The First Engagement of the Tutor is to look after the Minor's Education.* — The first engagement of the tutor is to take care of the person of his minor, to look after his education and conduct, and to lay out therefor necessary and reasonable charges, according as the quality and estate of the minor may require.<sup>b</sup>

## III.

1313. *The Minor's Mother is intrusted with his Education, if it is not otherwise provided.* — The mothers of minors are intrusted with their education, although they have not the guardianship; unless there be just reasons to deprive them of it; which, in case of doubt, ought to be determined by the judge, with the advice of the relations.<sup>c</sup>

<sup>a</sup> Nov. 72, c. 5.

<sup>b</sup> L. 21, D. de reb. cor. qui sub tut.

<sup>c</sup> L. 1, D. de adm. et per. tut.; — §. 1, — l. 1, D. de tutela et rat.; — l. 6, C. de test. tut.; — l. 5, § ult. D. de adm. et per. tut. See the ninth article of this section.

<sup>b</sup> L. 12, § 3, D. de adm. et per. tut. See the fifth and following articles.

<sup>c</sup> L. 1, C. ubi pup. educ.; — Nov. 22, c. 38. We have not inserted in this rule, that the mother by marrying a second husband forfeits the education of her children by the first marriage, as the law quoted on this article seems to determine. For although this con

## IV.

1314. *Of the Mother who marries a Second Husband.*—If the mother of the minor has married a second husband, the education of her children may be taken from her, or left to her in her married state with her second husband, according as the circumstances may require.<sup>d</sup>

## V.

1315. *Expenses of Education.*—The education of the minor comprehends his food and raiment, his lodging, medicines, salaries to preceptors, charges laid out on his studies and other exercises; and, in general, all necessary and reasonable expenses, according to the quality and estate of the minor.<sup>e</sup>

## VI.

1316. *How these Expenses are regulated.*—The expenses of education ought to be regulated in such a manner, that nothing decent or necessary be wanting to the minor, according to his condition and his revenue; and likewise that his whole income be not laid out on his education.<sup>f</sup> And even as to minors who have the greatest estates, the expenses of their education ought to be moderated.<sup>g</sup> And if the estate of the minor increases or is diminished, the expenses of education may be augmented or diminished in proportion, if it be necessary.<sup>h</sup>

## VII.

1317. *The Will of the Father about the Minor's Education.*—If the father of the minor has regulated what concerns his education, either as to the place where he should be educated, or the manner or expenses of his education, his will ought to be observed in this matter, unless there be just cause for regulating these things in another manner. Thus, for example, if the father, believing himself to be richer than he really was, had ordered too expensive an

education ought sometimes to have this effect, yet by our custom the mother is not deprived of the education of her children by the bare effect of her marrying a second husband. See the following article.

<sup>d</sup> This is a consequence of the foregoing article, and of the fourth article of the seventh section; where it is said that the father-in-law may be tutor.

<sup>e</sup> L. 2, D. ubi pup. educ.; — l. 12, § 3, D. de adm. et per. tut.; — l. 3, § 2, D. ubi pup. educ.; — v. l. ult. C. de aliment. pup. præst.

<sup>f</sup> L. 2, § 1, D. ubi pup. educ.; — l. 3, § 1, cod.; — Nov. 72, c. 7.

<sup>g</sup> D. l. 3, § 3.

<sup>h</sup> D. l. 3, § ult.

education for his son, it may be moderated; as, on the contrary, it may be augmented, if what the father has appointed be not sufficient, according to the condition and estate of the minor. Thus, one might commit the education to other persons than those named by the father, if it should be found that the conduct of the said persons would expose either the life or manners of the minor to any danger. And if the father had intrusted the education of his son to the person whom he had substituted to succeed him in the estate, the judge ought in prudence, with the advice of the minor's relations, to prevent both the danger and even the suspicion of it, if there should appear to be any ground for it. Thus, in other difficulties of the like nature, it will be prudent to follow or not to follow the directions of the father, according as the consideration of the advantages of the minor may require.<sup>1</sup>

## VIII.

1318. *A Minor without an Estate.*— If the minor have no estate, or has not sufficient for his maintenance, the tutor is not obliged to contribute any thing of his own towards it. For the office of a tutor consists only in taking such care as the administration of the minor's concerns may demand.<sup>1</sup>

## IX.

1319. *The Second Engagement of the Tutor is the Administration of the Estate.*— The second engagement of the tutor concerns the administration of the estate of the minor. And this engagement obliges him to take the same care of the goods and affairs of his minor, as a careful master of a family takes of his own. Thus, the tutor must answer for any fraud, and for faults that are contrary to this care; but not for the bad success of what shall have been rightly managed, nor for accidents.<sup>m</sup>

## X.

1320. *Inventory of the Goods of the Minor.*— The first duty of the tutor, as to the administration of the goods of the minor, is to

<sup>1</sup> L. 2, § ult. D. ubi pup. educ.;—l. 1, D. cod.;—l. 5, cod.;—l. 3, § 1, cod. See the eighteenth article.

<sup>1</sup> L. 1, § ult. D. ubi pup. educ.

<sup>m</sup> L. 33, D. de adm. et per. tut.;—l. 10, cod.;—l. 1, D. de tutela et rat.;—l. 7, C. arb. tut.;—l. 3, § 7, D. de cont. tut. et ut. act.;—l. 4, C. de per. tut. See the thirty-fourth article.

make an inventory of them, as the judge shall direct, before he enters upon the management of the estate; that he may know what he is charged withal, and that he may be able to give an account of it when his tutorship is at an end. But if, before the making of the inventory, there happens any affair which does not admit of delay, the tutor may give order about it, according as necessity shall require.<sup>n</sup>

## XI.

1321. *The Inventory being made, the Writings and Effects are put into the Hands of the Tutors.*—The inventory of the goods being made, all the deeds and writings are delivered over into the hands of the tutor, that he may take care of the affairs, call in the debts, use all necessary diligence in lawsuits, and give order about every thing wherein the interest of the minor is concerned.<sup>o</sup> But as to lawsuits, he ought neither to commence any for the minor, nor defend any that are brought against him, without the advice of the persons of whom he is to take counsel in the matter. And he ought likewise to govern himself by their advice, in suing the debtors of the minor, that he may not engage him in any fruitless lawsuits against debtors who are not solvent. And, in fine, in all things doubtful, the tutor ought to govern himself according to the advice of the relations of the minor.

## XII.

1322. *The Tutor is put into Possession of all the Goods.*—All the immovables belonging to the minor are likewise put into the power and possession of the tutor, that he may take care of them, reap the fruits, and gather in the revenues.<sup>p</sup>

## XIII.

1323. *The Tutor ought to sell the Movables belonging to the Minor.*—Seeing movables are liable to perish, or to be lost, and that besides they yield no revenue, the tutors ought to sell them

<sup>n</sup> L. 24, C. de adm. tut.; — l. 7, D. de adm. et per. tut.; — l. ult. § 1, C. arbit. tut. et per. tut.  
<sup>o</sup> L. ult. § 1, C. arbit. tut.; — l. 2, C. arbit. tut.; — l. 57, D. de adm. et per. tut. See the ninth article.

<sup>p</sup> L. 15, § 5, D. qui satisd. cog. According to the usage in France, the lands of minors are farmed out to the highest bidder, after public notice given, and that by the advice of the relations; and the tutor is not allowed to keep the lands in his own hands, except no person can be found to take them to farm, and even in that case he is to hold them on the conditions which he and the minor's relations agree on.

without delay, and put out the money to interest, or employ it in the purchase of lands. But if there should happen to be any just cause of delay, as in that case the tutor ought not to be blamed for not using too precipitate a diligence, so likewise he ought not to be excused if he has been guilty of any negligence on his part.

#### XIV.

1324. *The Tutor cannot purchase the Goods of the Minor.*—The tutor cannot purchase the goods of his minor, either directly in his own name, or by the interposition of a third person. For besides that he cannot be seller and buyer of the same thing, he might easily cheat, and purchase at an under rate what he has the sale of.\*

#### XV.

1325. *Exception to the Rule for the Sale of Movables.*—If among the movable things there be some which are of necessary use to the estate of the minor, such as cattle in a farm, wine-presses, or vessels for the vintage, and others of the like nature, these kinds of movables are to be kept.\*

#### XVI.

1326. *Another Exception.*—If the guardianship is to last but a short time, the minor being near at age, and it be found more useful to keep the movables that may be necessary to him when he comes to be of age, since, if he has them not of his own, he

\* L. 7, § 1, *D. de adm. et per. tut.*; — l. ult. § ult. *C. eod.*; — l. 22, in fine, *C. eod.*; — l. ult. *C. quando decreto opus non est*; — l. 3, *C. de peric. tut.*; — l. 24, *C. de adm. tut.* By the ancient law of the Romans, the tutor was not only obliged to sell the movables, but even the houses, because of the danger of fire; *domus vel uliæ res periculo subjectæ*. L. 5, § 9, *D. de adm. et per. tut.*; — l. 22, *C. de adm. tut.* The Emperor Constantine forbade the sale of any immovable, or even movable goods, without a judicial inquiry into the matter and sanction of the judge, except clothes, and such living creatures as were not of necessary use to the minor, which the tutor was permitted to sell without any previous order from the judge, *D. l. 22*. In France, by the ordinance of Orleans, article 102, tutors are obliged, as soon as they have made an inventory, to sell by authority of a court of justice all the movable goods that are not perishable, and to put out the money to interest, or to employ it in the purchase of lands or houses, by the advice of the relations and friends. See the sixteenth article.

\* L. 5, § 2, *D. de cust. et comp. tut.*; — d. l. § 3; — l. 9, *D. de reb. eor. q. s. l.*  
\* L. 20, in fine, *C. de adm. tut.* See the seventeenth article.

must necessarily purchase them of others, the tutor may be ex-

## XVII.

1327. *Another Exception.*— If for other reasons it be necessary or useful to the minor to keep some of the movables, such as jewels, pictures, and other precious movables belonging to an illustrious family, or sets of horses, and other things necessary to the person or estate of the minor, care ought to be taken, in these and the like cases, to reserve such kinds of things, according as the quality of the minor, the use of such movables, and other circumstances, may require.\*

## XVIII.

1328. *The Advantage of the Minor is to be preferred to the Disposition of the Father.*— If the father of the minor hath forbidden, by some disposition, the sale of his movables, the tutor shall nevertheless be under an obligation to sell them; unless there be some particular consideration that obliges him to keep them. And this ought to be regulated by the judge, with the advice of the relations.\*

## XIX.

1329. *Small and Desperate Debts ought to be sold.*— If among the goods of a minor there be debts owing to him, which it may be more useful to sell than to sue for at law, because of the danger of being at fruitless charges; as, for example, if, in the succession of a merchant by retail, there be a great number of small debts, which it may be either impossible or very difficult to recover, because of their multitude, their smallness, and the difficulties in recovering them at law, these sorts of debts may be

\* Seeing the movables of minors are to be sold only in order to prevent their perishing, and that the money which they yield may be improved, and that these motives cease in the case of this article, the disposition of the law which orders the sale of the movables ought to cease here likewise.

\* Gemmas, ceteraque mobilia pretiosa. L. 22, C. de adm. tut. This law forbids in general the sale of all the movables of minors, except such things as he should be judged necessary to sell after a judicial inquiry into the matter, and a decree of the judges; which was contrary to the ancient law of the Romans, and to our custom. See the thirtieth article of this section, with the remarks on it. See also the preceding articles. See the seventh article of L. 5, A. 2, D. de adm. et per. tut. See the preceding articles. See the seventh article, as to the will of the father.

sold, the necessary formalities being observed in the sale, and the other debts, with the recovery of which it may be more advantageous to charge the tutor, may remain unsold.

## XX.

1380. *How the Money is to be employed.*—All the moneys arising from the sale of the movables and other effects, as also the ready money that is found among the goods of the minor, ought to be employed by the tutor in paying off the minor's debts, if he owes any, and acquitting the other charges which he is liable to. And what money remains over and above ought to be laid out on the purchase of lands, or houses, or put out to use. And we must reckon among the debts which the tutor is bound to acquit, that which is owing to himself by his minor.<sup>a</sup>

## XXI.

1381. *Of a Tutor who is Creditor to his Minor, and compounds with the other Creditors.*—If the succession of the father of the minor be burdened with debts, and the tutor, being one of the creditors, compounds with the others for some abatement, in order to keep the minor from renouncing the succession, he shall be obliged to grant the same abatement of his own debt. Unless it be that, for some particular considerations, the friends and relations of the minor think fit to excuse the tutor from such composition.<sup>b</sup>

## XXII.

1382. *The Tutor obliged to pay Interest for the Minor's Money when he neglects to employ it for the Pupils Behoof.*—The moneys of the minor being, as much, or rather more, liable to perish than movable goods, there is the same reason for selling them.

<sup>a</sup> L. 24, C. de adm. tut.

<sup>b</sup> L. 9, § 5, D. cod.;—l. 8, C. qui dare tut. By the ordinance of Orleans, art. 102, tutors and curators are obliged to lay out the moneys on the purchase of annuities, or lands and tenements, with the advice of friends and relations, upon pain of paying in their own persons the interest of the money. This ordinance having directed the money to be laid out either on lands and tenements, or in annuities, it has excluded the putting it out to use otherwise, as being unlawful.

<sup>c</sup> L. 24, D. de adm. et per. tut. If the relations of the minor should find it reasonable to distinguish the condition of the tutor from that of the other creditors, in consideration of his care about the minor's concerns, and of the advantage he had procured to him by obtaining from the other creditors an abatement, which perhaps he himself was not in a condition to grant for the debt due to him, it might be just not to oblige the tutor to stand to the same composition for his own debt.



which shall arise by the redemption of annuities and the payment of other debts owing to the minor, as also the moneys which shall come to him by succession or otherwise, shall be employed in the same manner as the moneys arising from the sale of the movables in purchasing lands, or houses, or annuities. And if the tutor does not use all reasonable diligence to find out such a purchase, or if he converts the money of his minor to his own use, he shall be bound to pay interest for the sums which he shall have neglected to put out.<sup>c</sup>

## XXIII.

1333. *The Tutor has some Time allowed him for laying out the Minor's Money.* — The tutor is not bound to pay interest for the minor's money from the moment that he received it. But a certain time is allowed him to look out which way he can most safely lay it out for the benefit of the minor, whether it be money that was lying in ready cash at the time when the inventory was made, or money arising from the sale of movables or from other causes, or even what is saved out of the minor's revenues or income, of which we shall speak in the following article.<sup>d</sup>

## XXIV.

1334. *What is saved out of the Revenue, how to be employed.* — If the revenues of the minor exceed the expenses, the tutor is obliged to accumulate what remains over and above every year, to make a capital stock of it, to be laid out in the purchase of lands or tenements, or annuities, when it amounts to such a sum as may be

<sup>c</sup> L. 7, § 3, *D. de adm. et per. tut.*; — d. l. § 4; — l. 1, *C. de usur. pup.* By the Roman law the tutor was obliged to deposit the money which he had saved by his good management, that it might be laid out on some purchase. But by our custom, the money remains in the hands of the tutor, and he is to take care, at his peril, to employ it for the advantage of the minor.

<sup>d</sup> L. 7, § 11, *D. de adm. et per. tut.* According to our usage in France, the delay granted to the tutor for employing the principal sums which he may receive by the redemption of mortgages, or the like, depends on the circumstances, according to the quality of the sums, and the difficulties of employing them with safety and advantage; as to which the tutor is obliged to take his precautions by the advice of the relations. And as to the sums which arise out of what is saved of the rents, a time is fixed for accumulating them and converting them into a capital stock, such as once every three years; and a delay of six months is granted for laying out the said capital in the purchase of lands, or putting it out to interest. And if the tutor has not employed the money, he is obliged to pay interest for it in his own name after the said delays, it being presumed that he has converted the money to his own use. As to which he is obliged likewise to take his precautions. See the following article.

judged sufficient for such a use; which if he has neglected to do, he shall be bound to pay the interest of the remaining capital stock arising from what is saved of the said revenues, pursuant to the rule explained in the foregoing article.\*

## XXV.

1335. *How the Revenues arising from the new Funds ought to be employed.* — The rents and other revenues which shall arise from the funds that have been made out of the moneys which have been saved out of the revenue, are likewise to be accumulated into capital stocks, to be employed in the purchase of lands or tenements, or annuities, whenever they amount to sums sufficient for that purpose, as has been said in the preceding article, and according as the duration of the guardianship will allow of it. For all the money arising from the revenues being out of the hands of the debtors, and in the hands of the tutor, it is reckoned as a capital stock to the minor, which ought to be laid out for his advantage.

## XXVI.

1336. *If there be no Opportunity of laying out the Money to Advantage.* — If there be no opportunity found of putting out the money to a lawful and profitable use, the tutor will be discharged. But in order to have this discharge, he ought to take the necessary precautions, use his diligence, and procure proper attestations of the counsel given him by the persons with whom he was bound to advise, by which it may appear that the money has remained by him in specie, and that it was not possible for him to employ it to advantage.\* Otherwise he will be answerable for it, according to the rule explained in the following article.

## XXVII.

1337. *If the Tutor neglects to employ the Money, or to take his Discharge.* — If the tutor does not lay out the money, and does not take the necessary precautions to justify his not doing it, he will be liable to pay in his own name, interest for the money.

*L. 6, D. de adm. et per. tut.* See the preceding article, with the remark on it, as also the following article. If the tutor be indebted in his own name to his minor, he shall be bound to include in the capital stock arising from the revenues the interest which he himself owes. For he ought to have paid it; and it is the same thing with respect to him as if he had received the interest from another debtor. *L. 38, D. de neg. gest.*

*en L. 1, § 12, D. de adm. et per. tut.; — l. 53, § 1, cod.*

*§ L. 3, C. de usur. pup.; — l. 12, § ult. D. de adm. et per. tut.* See the following article.

in this case it is justly presumed that he has converted the money to his own use.<sup>h</sup>

## XXVIII.

1338. *Of the Administration of two or more Tutors.*—If a minor has two or more tutors, and by their nomination there is assigned to every one of them his particular charge, their administration will be distinct and separate; and none of them shall be accountable for the administration of the others.<sup>i</sup> But if the same administration be committed to two or more tutors, they will be all of them answerable for the whole. And whether they be willing to exercise their office jointly or separately, or agree among themselves to commit the management to one of their number, or whether they all neglect the administration, they shall all of them be bound one for the other, because it is their common charge.<sup>j</sup>

## XXIX.

1339. *The Benefit of Division and Discussion among many Tutors.*—If two or more tutors have been named to act jointly, and to be answerable for one another, yet notwithstanding this obligation for the whole that every one of them is under, when the minor comes to call them to account for their administration, he will be obliged to divide his action among those who have intermeddled in the management, and to discuss every one of them for his respective administration, or his heirs and executors, before he can sue one tutor for the other, unless that some of them should happen to be insolvent; and if there be any of the tutors who did not act, they are not to be sued till the others who did act be first discussed. If the tutors have renounced this benefit of division and discussion, they may be immediately sued every one of them for the whole. But whether this benefit take place or not, the tutors who have paid for the others will succeed to the minor's right of action against them for the recovery of what they shall have paid over and above their own share.<sup>m</sup>

<sup>h</sup> L. 4, § 3, *D. de adm. et per. tut.* See the preceding article, and the twenty-second article.

<sup>i</sup> L. 2, § 1, *C. de divid. tut.*

<sup>j</sup> L. 1, 2; — l. 1, §§ 11 et 12, *D. de tut. et rat. et distr.*; — d. l. 2, in fine; — l. 38, § 1, *D. de adm. et per. tut.*

<sup>m</sup> L. ult. *C. de divid. tut.*; — l. 1, § 11, *D. de tut. et rat. distr.*; — v. l. 2, § 2, *D. de cur.*

## XXX.

1340. *When there are many Tutors, who shall be preferred?—* If two or more tutors, named for the administration of the same guardianship, cannot agree either to act jointly together, and to answer one for another, or to intrust the management to one alone, the others answering for him; and if there be one of them who offers to give security, that he may have the sole management, the other tutors not offering the like security, he shall be preferred and intrusted with the sole management.<sup>a</sup> But if all the tutors offer to give security, then he who is the most capable and most responsible, both as to his own person and as to his surety, shall be preferred. For it is better that the minor's affairs be managed only by one person; and the other tutors, in this case, shall not be bound to answer for his administration.<sup>b</sup> If none of the tutors offer to give security, and they do not agree either to act jointly together, or to let one of their number manage for the others, the administration shall be divided among them; and in this case every one will be accountable only for his own. Or if the administration is committed to one of them alone, the other tutors refusing to answer for him, they shall be discharged.<sup>c</sup>

## XXXI.

1341. *The Obligation of Honorary Tutors.—* Although honorary tutors be not bound to concern themselves in the management of the minor's affairs, as the onerary tutors are who are charged with the administration, yet nevertheless, if, in the nomination of an honorary tutor, some particular function had been assigned him, and he had failed in it, or by connivance or an inexcusable negligence he had winked at the bad management of the onerary tutor, he might be made accountable for it according to the circumstances.<sup>d</sup>

*bon. dando;—d. l. 1, § 13, D. de tut. et rat. distr.;—l. 2, C. de divid. tut.* We do not explain in this article what the meaning is of these words *division* and *discussion*, because it appears plainly enough from the sequel. See the third article of the first section of the *Solidity among Two, &c.*

<sup>a</sup> *L. 17, D. de test. tut.;—§ 1, Inst. de satisfat. tut.;—l. 4, in fine, C. de tut. vel cur. qui sat. n. d.*

<sup>b</sup> *L. 18, D. de test. tut.;—l. 3, § 6, D. de adm. et per. tut.*

<sup>c</sup> *L. 3, §§ 6, 7, 8, 9, et l. 4, D. de adm. et per. tut.;—l. 55, eod.;—§ 1, Inst. de satisfationibus tut.* See the ninth article of the first section.

<sup>d</sup> *L. 60, § 2, D. de rit. nupt.;—l. 3, § 2, D. de adm. et per. tut.* See the sixth article of the first section. We have not conceived this rule in the rigor which it had by the Roman law; and we have drawn it up in terms which agree with our practice.

## XXXII.

1342. *The Tutor ought to give an Account after his Tutorship is ended.* — The last engagement of the tutor is to give an account of his administration; to answer for what he shall have ill managed, or neglected to do; to pay in the sums of money remaining in his hands, together with the interest thereof from the day of balancing the account; and to restore the fruits which he shall have reaped.\* And the engagement of giving an account is so indispensable, that although the father of the minor in naming the tutor had exempted him from giving an account, he would nevertheless be obliged to it; for otherwise the misdemeanours of a tutor might go unpunished; which is neither consistent with good manners nor public justice.†

## XXXIII.

1343. *Case where the Tutor is obliged to give an Account during his Administration.* — Tutors are not only bound to give an account after their trust is at an end, but they are likewise obliged to do it during their administration, if there falls out any thing that may make it necessary. Thus, for example, if the minor's creditors seize on his goods, in order to sell them, the tutor must give in a summary account of the minor's effects, that it may appear whether he has not ready money enough to pay off the debts.‡

## XXXIV.

1344. *Charge and Discharge in Tutors' Accounts.* — Tutors ought, in stating their accounts, to charge themselves with what they have actually received, and also with what they ought to have received; and in their discharge they may set down what they have not been able to receive, in order to be discharged of it,

\* L. 9, C. arbitr. tut.; — l. 1, D. de tutelæ et rog. distr.; — d. l. § 3; — l. 7, § ult. D. de adm. et per. tut.; — l. 1, § ult. D. de usur.; — l. 10, D. rem. pup. salv. fore.

† L. 5, § 7, D. de adm. et per. tut. It may not be improper to take notice upon this article, that according to the usage in France, contrary to the disposition of the Roman law, in the fourth and fifth laws, C. de trans, the tutor is under so strict an obligation to give an account, that even although the minor after he came to age had transacted with his tutor or guardian concerning his administration of the guardianship, or by an acquittance, or some other act, he had discharged him directly or indirectly when the tutor had not accounted to him, all these acts would be annulled. For it would be reasonably presumed that the tutor was guilty of fraud, by keeping the minor in ignorance of the state of his affairs, which he could have no knowledge of but by an account. So that these sorts of acts are reckoned dishonest, and contrary to good manners.

‡ L. 4, § 11, D. de reb. got. qui sub tut.

if there be ground for it, as where they have used all necessary diligence against a debtor, who proves to be insolvent. For tutors, although they be obliged to an exact and faithful administration, yet they ought not to be made accountable for the event.<sup>a</sup>

## XXXV.

1345. *The Tutor allowed all reasonable Expenses.*—Tutors may charge in their accounts all the expenses that a reasonable administration has obliged them to lay out.<sup>a</sup> In the number of which we must reckon the expenses which a tutor has laid out by the advice of the persons who were appointed to be his counsel, and those that have been directed by the judge, unless there should appear to be some fraud on his part.<sup>b</sup> But if any accident renders those expenses useless which it appeared reasonable to lay out, the tutor will nevertheless recover them.<sup>c</sup>

## XXXVI.

1346. *The Minor has a Mortgage upon the Estate of the Tutor.*—All the estate of the tutor is mortgaged, from the time of his nomination, for what he shall appear to be indebted to his minor, after stating his accounts.<sup>a</sup>

## XXXVII.

1347. *Of the Mother who is Guardian, and marries a second Husband.*—If the mother who is guardian to her children marries a second husband before she gets another tutor named to them, and gives in an account of her administration, and pays off or gives security for what she is indebted to them, the estate of the second husband will be mortgaged to the minors for all that the mother shall appear to be indebted to them by the balance of the account, both for the time past before the marriage, and for what follows after.<sup>b</sup>

<sup>a</sup> L. 9, C. arbitr. tut.;—l. 3, § 7, D. contr. tut. et ut. act. See the ninth article.

<sup>b</sup> L. 1, § 4, D. de contr. tut. et ut. act. See the third article of the second section.

<sup>c</sup> L. 5, § 15, D. de reb. cor. qui sub. tut. Although this text belongs to another subject, yet it may be applied to this case.

<sup>a</sup> L. 3, § 7, D. de contr. tut. et ut. act. See the seventh article of the second section: *Of those who Manage the Affairs of others without their Knowledge.*

<sup>b</sup> L. 20, C. de adm. tut.;—l. 7, § 5, in f. C. de jur. fur.;—l. 1, § 1, C. de rei us. act. See the sixth article of the fifth section. Nov. 118, c. 5, in f. See the fifth article of the second section of *Mortgages.* See, hereafter, the sixth article of the fifth section.

<sup>c</sup> L. 6, C. in quib. caus. pign. vel hypoth. tacite contrahatur;—l. 2, C. quando mulier tutelar.

## SECTION IV.

OF THE ENGAGEMENTS OF THOSE WHO ARE SURETIES FOR TUTORS;  
AND OF THOSE WHO NAME THEM; AND OF THEIR HEIRS AND  
EXECUTORS.

## ART. I.

1348. *Sureties of Tutors, to what they are obliged.*—Those who become sureties for tutors are bound for all that the tutors may chance to owe on account of their administration.<sup>a</sup> But if, after the tutorship was expired, the tutor intruded himself into some new affair of the minor's, which was not a necessary consequence of the tutorship, he who was his surety will not be answerable for it.<sup>b</sup>

## II.

1349. *The Tutor ought to be first discussed before an Action is brought against his Surety.*—If the sureties of tutors are bound only as simple sureties, without renouncing the benefit of discussion, they cannot be sued till after a discussion of the estate of the tutors for whom they are bound;<sup>c</sup> and that according to the rules which shall be explained in the title of *Cautions or Sureties*.

## III.

1350. *Of those who certify the Tutor to be Solvent.*—Among

*officio fungi potest.* This rule is most equitable, to prevent the frauds which might ensue upon second marriages, in transferring the movable goods of minors, and even those of the mother, to the children of the second marriage, or even to the husband himself. And it is because of the equity of this rule, that, although it be not punctually observed, we have judged it proper not to suppress it.

<sup>a</sup> *L. 2, C. de fidejuss. tut.*; — *tot. tit. D. et C. cod.*; — *Inst. de satisfact. tut.* See the thirty-second article of the third section, and the tenth law, *D. rem. pup. solv. fore*, which is there quoted.

<sup>b</sup> *L. 46, § 4, D. de adm. et per. tut.*

<sup>c</sup> *V. Nov. 4, c. 1, — l. 2, in fin. C. de fidej. tut.* By the ancient law of the Romans, it was lawful to sue the sureties of tutors before the discussion of the tutor himself. *L. ult. D. rem. pup. solv. fore*; — *l. 7, D. de fidej. tut.*; — *l. 1, C. cod.* But the fourth Novel, ch. 1, has given to all sureties in general the benefit of discussion, without excepting the sureties of tutors. And the said benefit is altogether natural to the obligation of a surety, which is to pay in case the principal party that is bound does not pay, *ad supplendam indemnitatem.* *D. l. 2, C. de fid. tut.*

the sureties of tutors we are to reckon those who, without binding themselves expressly as sureties, have certified that the tutor was solvent; for they ought to answer for him as much as if they were his sureties.

#### IV.

1351. *Of the Persons who name a Tutor.*—If the persons who have the nomination of a tutor have been guilty of any misdemeanour, as if they have named a person who was apparently insolvent; the persons who named him must answer for him. But before the minor can bring his action against those who named the tutor, he ought to discuss the tutor and his sureties.\*

#### V.

1352. *Engagements of the Heirs or Executors of Tutors.*—The heirs or executors of the tutor are bound to answer for his whole administration, and even for the damages occasioned by his fraud or negligence, as also for what he may have failed to look after. And they must give in an account for him, as he ought to have done himself.

#### VI.

1353. *The Duty of the Heirs or Executors of Tutors in Affairs begun by the Tutors before their Death.*—Although the heirs or executors of tutors be not tutors, yet if the heir or executor of the tutor deceased be a man come to full age and capable of business, he is obliged to take care of the affairs which the tutor had begun, till another tutor be named, or till some other provision be made therein; and if he should fail to do it, either through fraud or gross negligence, he would be made accountable for it.<sup>s</sup>

<sup>d</sup> L. 4, in f. D. de fidej. tut.

<sup>e</sup> L. 4, C. de magistr. conv. We say nothing here of the engagements of magistrates towards minors, in what concerns the nomination of tutors. For our usage is altogether different from the Roman law, which obliged the magistrate to give to the minor a tutor that was solvent, and to take good security from those who were bound to give it. L. 1, § 12, l. 6, D. de magistr. conv. But by our usage the magistrate only confirms the nomination of a tutor who is chosen by the relations of the minor, and gives him the oath. So that the judges are not answerable for the solvency of the tutors, unless they have been guilty of some prevarication which may oblige them to it.

<sup>f</sup> L. ult. C. de hered. tut.; — l. 2, cod.; — l. 10, C. arb. tut.; — l. 12, cod.

<sup>g</sup> L. 16; § 1, D. de tut.; — l. 1, D. de fidejuss. et nom. et her. tut. See the following article, and the third article of the sixth section.



## VII.

1354. *Of new Affairs which fall out after the Tutor's Death.*—As for the affairs which were not begun by the tutor, and which came not to the knowledge of his heir or executor, he is not bound to take care of them. But if through gross neglect he had abandoned an affair of the minor's which he knew of either by himself or others, he would be made answerable for it.<sup>a</sup>

## VIII.

1355. *If the Heir or Executor takes upon himself the Tutorship.*—If the heir or executor of the tutor takes upon himself the administration of the tutorship, he shall be bound to take the same care as if he were tutor.<sup>b</sup>

## IX.

1356. *The Surety is discussed before the Co-tutor.*—If there be several tutors bound for one and the same administration, and one of them hath a surety, the other tutors cannot be sued on account of that tutor, till after the discussion of his surety.<sup>c</sup>

## SECTION V.

OF THE ENGAGEMENTS OF MINORS TO THEIR TUTORS.<sup>d</sup>

## ART. I.

1357. *A general Engagement of the Minor to the Tutor.*—As tutors are bound for every thing that relates to the administration of the estate of the minor, and as they have power to do every thing which the duty of their charge requires, so likewise the minors are reciprocally obliged to approve and ratify, after they come of age, every thing that the tutors have done reasonably and honestly. And they are moreover bound to their tutors in the engagements explained in the following rules.<sup>e</sup>

## II.

1358. *The Minor ought to allow all Reasonable Expenses.*—The

<sup>a</sup> L. 4, § 1, D. de fidejuss. tut. — l. 1, C. de hered. tut.

<sup>b</sup> L. 4, D. de fidejuss. et nom. et hered. tut.

<sup>c</sup> L. 1, § 15, D. de tut. et tut. dist.

<sup>d</sup> L. 12, § 1, D. de adm. et per. tut.; — l. 1, D. de contr. tut. et ut. tut.

minor, being come to full age, ought to allow to his tutor, in the account of his administration, all the expenses which shall have been laid out on his person, his estate, and his affairs, according as they shall appear to have been necessarily or usefully laid out, or to have been settled by the judge in the cases where the tutor was bound to procure such a regulation.<sup>b</sup>

### III.

1359. *A Steward.* — If the tutorship be such as that, for the ease of the tutor, it be necessary to give him the assistance of a steward, the salary which he shall give to such person will be allowed him in his account, according as it shall have been regulated during the tutorship, or as it shall be adjudged at the stating of the account, and in proportion to the quality of the minor, and the nature of his estate and affairs; the tutor remaining always responsible for the deed of the persons whom he shall have employed to assist him. And although the tutor have not really employed a steward, yet he will nevertheless be allowed the expenses of one, if his administration required this assistance.<sup>c</sup>

### IV.

1360. *Alimony to the Father and Mother, Brothers and Sisters, of the Minor.* — If the father, mother, or brothers and sisters of a minor under tuition had no means of subsistence, and the minor had an estate, he would be bound to allow to his tutor the expenses which he had laid out in supplying those persons with the necessaries of life,<sup>d</sup> according to the regulation which shall have been made in this matter.

### V.

1361. *The Tutor allowed Interest for the Money which he advances.* — If the tutor has been engaged in some expenses, having no fund in his hands either of the minor's revenues or of his other effects, so that he hath been obliged to borrow, or advance money of his own, the interest of the money which he shall have

<sup>b</sup> L. 1, § 4, D. de contr. tut. et ut. act. See the fifth article of the second section.  
<sup>c</sup> L. 13, § 1, D. de tutelle; — L. 24, D. de adm. et per. tut.; — L. 3, § ult. D. eod.; — L. 1, § 7, D. de tut. et rat. distr.

<sup>d</sup> L. 13, § 2, D. de adm. et per. tut.; — L. 4, in f. D. ubi pup. educ. See the fourth article of the second section of the *Rescission of Contracts*. According to the practice with us, tutors ought not to lay out these kinds of expenses without having them first allowed and regulated by the judge.

advanced will, be allowed him, till a sufficient fund can be raised, either out of the minor's revenues, or otherwise, for his reimbursement.\*

## VI.

1362. *The Tutor has a Mortgage on the Minor's Estate.*—As the minor hath his mortgage on the estate of the tutor, for all that the tutor may chance to owe him on account of his administration, so the tutor likewise hath on his part a mortgage on the estate of the minor, for the sums that the minor may chance to be indebted to him by his account.† For the engagement of the tutor and that of the minor being reciprocal, and being contracted at the same time, the mortgage, which is an accessory to the engagement, is contracted likewise in the same manner. And if, for example, the minor, being come to full age, borrows money of any one before his tutor has made up his accounts, and it appear upon the balance of the account that the tutor is creditor, the tutor's mortgage will be prior to the debt contracted by the minor after he came of age.

## VII.

1363. *A Case where the Tutor is privileged in his Mortgage.*—Besides this mortgage, the tutor hath likewise a privilege for the money which he has laid out in the recovery or preservation of the minor's estate and debts. And he is preferred, in his mortgage on such estate and debts, to other creditors.‡

\* *L. 3, § 1, D. de contr. tut. et ut. act.*; — *d. l. 3, § 4*; — *d. l. 5*. See the fifth article of the second section *Of those who manage the Affairs*, &c. This interest is not to be reckoned usurious, if the tutor suffers any loss by this advance; but he ought not to advance the money imprudently, without the advice of the minor's relations.

† *L. un. § 1, C. de rei uz. act.*; — *l. 1, D. de contr. tut. et ut. act.*; — *l. 2, Inst. de oblig. quasi ex cont.*; — *l. 5, § 1, D. de obl. et act.* See the thirty-sixth article of the third section. Although this mortgage which the tutor hath on the minor's estate were not founded on these laws, yet it is a natural consequence of his administration, and of the mutual obligation that is contracted between the tutor and the minor.

‡ See the sixth article of the third section of *Curators*, and the twenty-fifth article of the fifth section of *Pawns and Mortgages*.

## SECTION VI.

## OF THE WAYS WHICH PUT AN END TO THE TUTORSHIP, AND OF THE DEPRIVATION OF TUTORSHIP.

## ART. I.

1364. *The Tutorship is at an End when the Minor comes of Age.*—The office of tutor is at an end when the person who was under tuition comes of age. For being arrived at full age, he may take upon himself the care of his estate, and of his affairs. But the benefit of age by indulgence hath not the same effect.

## II.

1365. *Of the Tutorship of several Minors.*—If there are two or more minors under the tuition of one and the same tutor, the tuition ends for every one as they respectively arrive at age; and he who has attained the years of majority may oblige the tutor to give an account of his administration, although the tutorship continue still with respect to the others.<sup>b</sup>

## III.

1366. *The Consequence of the Administration after Majority.*—Although the tutorship ends the moment that the minor arrives at the age of majority, yet the tutor is not so discharged by this change as that he may immediately abandon all further care of the minor's concerns. But he ought to continue his administration as to those affairs which he cannot neglect without occasioning some loss or damage to the minor. And he ought to give order about every thing that is necessary, and which does not admit of delay; till he has given up his accounts, or till he has, waiting for a convenient time to make up his accounts, delivered over the affairs and papers into the hands of his minor, who is become major, that he may look after them himself.

<sup>a</sup> *Inst. quib. mod. tut. fin.*;—l. 1, C. quando tut. vel cur. esse desinant;—*Inst. de curat.* See the remarks in the preamble of this title. See, as to the benefit of age, the twenty-second article of the second section of the *Rescission of Contracts*.

<sup>b</sup> L. 39, § 17, D. de adm. et per. tut.

<sup>c</sup> L. un. C. ut caus. post pubert. ads. tut.;—l. 5, § 5, in f. D. de adm. et per. tut.;—d. l. § 6;—v. l. 27, D. de appel.;—l. 13, D. de tut. et rat. dist. See the sixth article of the fourth section.

## IV.

**1367. *The Death of the Minor puts an End to the Tutorship.*** — The tutorship likewise expires by the death of the minor.<sup>a</sup> But so as that the tutor ought not to abandon that which requires his care, till the heirs of the minor be in a condition to discharge him of it, according to the rule explained in the foregoing article.

## V.

**1368. *As also the Death of the Tutor.*** — If the tutor dies during the tutorship,<sup>b</sup> it is thereby at an end, not only with respect to himself, but also to his heirs and executors. And they shall be bound only according to the rules explained in the fourth section.

## VI.

**1369. *The Civil Death either of Tutor or Minor hath the same Effect.*** — The tutorship ends likewise by the civil death either of the tutor or of the minor.<sup>c</sup> For as to the tutor, the civil death renders him incapable of that office; and as to the minor, it puts him out of a condition of standing in need of a tutor, being no longer master of his own person, nor of any estate. But the tutor is obliged, after the civil death of his minor, to take care of his estate, pursuant to the third and fourth rules of this section, for the benefit of those to whom he shall be bound to give an account of it.

## VII.

**1370. *When the Tutor is excused or removed, the Tutorship ceases.*** — If the tutor is discharged from his office at his own request, he pleading a reasonable excuse, or if he is turned out for misdemeanour, his trust is at an end.<sup>d</sup>

## VIII.

**1371. *Causes for which the Tutor may be removed.*** — The tutor may be removed from his office, if his bad conduct be such as to deserve that the management of the minor's concerns be taken out of his hands; as if he prevaricates in defending the rights of

<sup>a</sup> L. 4, D. de tut. et rat. distr.; — § 3, Inst. quib. mod. tut. fin.

<sup>b</sup> L. 4, D. de tut. et rat. distr.; — § 3, Inst. quib. mod. tut. fin.

<sup>c</sup> § 4, Inst. quib. mod. tut. fin.; — l. 14, D. de tutel.; — d. l. §§ 1 et 2; — d. l. § 4; — d. l. 14.

<sup>d</sup> L. 14, § 4, D. de tutel.; — § ult. Inst. quib. mod. tut. fin.

the minor, that he may lose them; if he abandons the affairs; if he absents himself, and refuses to appear, leaving the minor's concerns in disorder; if he does not furnish the necessaries for his minor's maintenance and education, having wherewithal to do it; and, in general, if there are any other just causes for removing him, although it were only negligence, if it be such as makes it necessary to put the management of the minor's affairs into other hands.<sup>b</sup>

IX.

1372. *The Tutor that is removed for his Dishonesty is branded with Infamy.* — The tutor who is removed from his office, because of his fraudulent dealing, is branded with infamy; but he is not so, who is removed on account of his negligence, or his unfitness for such a charge. And if the cause of his removal be not expressed in the sentence of his deprivation, his removal will not be attended with any mark of infamy; it being reasonable to presume, in that case, that the tutor was removed only for his negligence or incapacity.<sup>1</sup>

X.

1373. *Misdemeanours that are punishable.* — If a tutor has procured the tutorship by bribery, or if his misdemeanours be such, that, besides the removing him from his trust, he deserves some other punishment, he shall be liable to such punishment as the nature of the act shall deserve.<sup>1</sup>

SECTION VII.

OF THE CAUSES WHICH RENDER PERSONS INCAPABLE OF BEING TUTORS, AND OF THOSE WHICH EXCUSE THEM FROM THAT OFFICE.

1374. *We have not put down in this section, among the incapacities and excuses which may suffice for discharging any one from the office of tutor, that which was regulated by Justinian,*

<sup>a</sup> L. 3, § 5, D. de susp. tut.; — d. l. 3, § 17; — d. l. 3, §§ 14 et 15; — l. 7, § ult. cod.; — d. l. 7, § 1; — l. 3, § 12, cod.

<sup>b</sup> L. ult. C. de susp. tut.; — l. 3, § ult. D. de suspect. tut.; — l. 4, §§ 1 et 2, D. de susp. tut.

<sup>c</sup> L. 9, D. de tutel.; — l. 3, § 15, in f. D. de susp. tut.; — l. 1, § 7, D. de off. prof. ubi.

<sup>d</sup> l. 1, § ult. D. de susp. tut.

<sup>e</sup> Nov. 72, c. 1.

that those who were either creditors or debtors to minors should be incapable of being their tutors. For although the person who is named tutor should be found to be either debtor or creditor to the minor, yet our usage provides sufficiently for the safety of minors, by ordering an inventory of their goods to be made, and to be lodged in court; which preserves the titles of their claims, or defences against their tutors, and by appointing them a curator, or substitute-tutor, to defend them in any disputes they may chance to have with their tutors.<sup>b</sup> But if the debt, or other affair, that is in dispute between the tutor and the minor, be such that it is evidently more for the advantage of the minor to have another tutor, it will in that case be prudent for the judge to oblige the relations to make choice of another tutor.

### ART. I.

1375. *Difference between Incapacity and an Excuse.* — Incapacity excludes from the tutorship even those who would willingly accept of it;<sup>a</sup> and an excuse dispenses with those who might be tutors if they pleased.<sup>b</sup>

### II.

1376. *Causes of Incapacity and Excuses.* — The causes of incapacity have their foundation either in natural equity, or in some particular law.<sup>c</sup>

### III.

1377. *Women cannot be Guardians, but to their own Children.* — Women are incapable of being guardians to any besides their own children. For the office of guardian requires an authority, and obliges the person to functions, which it would be indecent for a woman to exercise towards any other persons besides her own children.<sup>d</sup>

### IV.

1378. *Mothers and Grandmothers may be Tutoreses or Guardians.* — *The Father-in-Law may be Tutor.* — Mothers and grand-

<sup>a</sup> See the remark on the seventeenth article.

<sup>b</sup> *Inst. de excus. tut.*

<sup>c</sup> Which will appear by the following rules.

<sup>d</sup> *L. ult. D. de tut.*; — l. 1, *C. quando ma. tut. off. f. p.*; — l. 2, *D. de reg. jur.*; — l. 21, *D. de tut. et curat.*; — l. 16, *D. de tut.* See the following article.

<sup>a</sup> 5 14, *Inst. de excus. tut. vel. cur.*

mothers may be tutoresses or guardians to their own children; for the authority which nature gives them over their children, and the affection which they have for their interests, except them from the rule which excludes women from guardianships.\* And as the mother is capable of being tutoress or guardian, so the guardianship may be likewise committed to her second husband, father-in-law to the minor.<sup>f</sup>

## V.

1379. *Minors cannot be Tutors.*—Minors cannot be tutors, because they themselves are under tuition, and stand in need of the assistance of others in the managements of their own concerns.<sup>g</sup>

## VI.

1380. *Infirmities which render Persons incapable of being Tutors.*—Those who labor under any infirmity, which disables them from looking after their own concerns, are incapable of being tutors; such as persons who are mad, blind, deaf, dumb, and those who are under any habitual malady which produces the same effect.<sup>h</sup> And if these kinds of accidents happen to a tutor after he has been named, and even after he has acted as tutor, he shall be excused.<sup>i</sup> But if the disease or infirmity which seizes the tutor during the tutorship be only for a time, a curator may be named in the mean while to supply the place of the tutor during his illness, if there be occasion.<sup>j</sup>

## VII.

1381. *A Son that is of Age may be a Tutor.*—A son who is of full age, although under the father's authority, may be a tutor; but the father will not be accountable for his son's administration, if he does not oblige himself to it either expressly or tacitly, as if he himself acts and intermeddles in the administration of the minor's estate. But a bare consent to his son being named tutor, and to his taking upon him the administration, does not bind him.<sup>k</sup>

*Inst. D. de tut. l. ult. tit. C. quando mulier tut. off. f. p. — Nov. 118, c. 6.*

<sup>f</sup> L. 3, C. de contr. jud. tut.; — v. l. 2, C. de interd. mar.; — l. 32, § 1, D. de adopt.

<sup>g</sup> § 13, Inst. de excus. tut.; — l. ult. C. de leg. tut.

<sup>h</sup> B. 1, § 2, D. de tut.; — d. l. § ult.; — l. 10, § 1, D. de legit. tut.; — l. un. C. qui morbo; — l. 3, C. qui dare tut.; — l. 10, in f. D. de excus.; — § 7, Inst. eod.

<sup>i</sup> L. 11, D. eod.; — l. 40, D. de excus.

<sup>j</sup> L. 10, § 1, D. de tut.

<sup>k</sup> L. 7, C. de tut.; — l. 21, D. de adm. et per. tut.



## VIII.

1382. *Other Causes for not confirming the Nomination of a Tutor.* — If, besides the cases of incapacity just now mentioned, there should happen to be in the person who is named tutor any other cause which might render him unworthy of the office or give ground of suspicion, the judge ought in prudence not to confirm such nomination. Thus, for example, if it should be found out that the tutor gave money to get himself named, not only should the said nomination not be confirmed, but this offence would deserve to be punished. Thus, he whom the father had forbid to be named tutor to his son ought not to be admitted to that office without very pregnant reasons.<sup>a</sup> But that exclusion would not any way blemish the reputation of the said person.<sup>b</sup> Thus, he ought not easily to be admitted as tutor who makes interest to get himself named.<sup>c</sup>

## IX.

1383. *Excuses of Two Kinds.* — The excuses alleged by tutors to free themselves from the tutorship are, in the same manner as incapacities, founded either upon some natural impediment, or on some particular law.<sup>d</sup>

## X.

1384. *Incapacity serves as an Excuse.* — The causes of incapacity which may be fairly alleged may likewise serve as excuses. Thus minority, and the infirmities which render persons incapable of being tutors, ought to excuse them from the office.<sup>e</sup>

## XI.

1385. *Excuse on the Account of being upwards of Seventy Years old.* — Those who are past seventy years of age may excuse themselves from being tutors.<sup>f</sup>

XII.<sup>g</sup>

1386. *The Number of Children is an Excuse.* — If he who is named to be tutor has five children lawfully begotten and alive,

<sup>a</sup> L. 9, D. de tut. ; — l. 21, § ult. D. de tut. et cur. dat.

<sup>b</sup> L. 21, § 2, D. de tut. et cur. dat.

<sup>c</sup> L. 21, § ult. D. de tut. et cur. dat. ; — v. l. 19, D. de test. tut.

<sup>d</sup> This will appear by the following articles.

<sup>e</sup> § 13, Inst. de excus. tut.

<sup>f</sup> L. 2, D. de excus. ; — § 13, Inst. eod. ; — l. un. C. qui cetate.

he is excused. The children which are unborn, although conceived, are not reckoned in the number of the children which serve as an excuse. And the grandchildren, and other descendants of children that are deceased, are counted as representing the person of whom they are descended. Thus several children of one son are reckoned in this case only as one child.<sup>1</sup>

## XIII.

1387. *Three Tutorships excuse from a Fourth.*—He who has already the burden of three tutorships may excuse himself from accepting a fourth. We do not reckon as so many tutorships those of many minors, when the estate of all the minors is managed by one and the same administration.<sup>2</sup> Neither do we reckon in the number of tutorships that serve as an excuse the engagements of honorary tutors, nor that of the sureties of tutors.<sup>3</sup>

## XIV.

1388. *One Tutorship that is Burdensome will serve as an Excuse.*—If one tutorship alone be of such extent, or so burdensome, that it would be hard to call the tutor to a second tutorship, he shall be excused.<sup>4</sup>

## XV.

1389. *Enmity between the Minor's Father and the Tutor.*—If there had been a mortal hatred between the father of the minor and the person who is named tutor, and there never was any reconciliation between them, the tutor shall be excused from accepting the office.<sup>5</sup>

<sup>1</sup> L. 2, § 2, *D. de excus.*; — l. 1, *C. qui num lib se excus*; — *Inst. de excus. tut.*; — d. l. 2, § 3, *D. de excus.*; — d. l. 2, § 4, — l. 1, *C. qui num lib*; — d. l. §§ 6, 7. We have not limited in this article what is said of grandchildren to those descended of males, in which sense it is limited in the seventh section above quoted. For although daughters and their children be in another family, yet it often happens that the daughters and their children are as much or more chargeable to the fathers than the sons are; and it would be hard, that a grandfather on the mother's side, who has the burden of children of several daughters deceased, should be deprived of the benefit of this excuse. And therefore it is that our usage admits for an excuse the guardianship of grandchildren by daughters.

<sup>2</sup> L. 3, *D. de excus.*; — l. 2, § ult. *ead.*; — l. unic. *C. qui num tut.* See the following article.

<sup>3</sup> L. 15, § 9, *D. de excusat.*

<sup>4</sup> L. 32, § 4, *D. de excus.*

<sup>5</sup> § 11, *Inst. de excus. tut.*; — l. 6, § 17, *D. de excus.*

## XVI.

1390. *Lawsuits which excuse.*— If there be a lawsuit between the minor and the person whom they intended to name tutor, which calls in question the minor's legitimacy, or claims a right to all his estate or a great part of it, the said person shall be excused from the tutorship. But lawsuits of a small consequence will not serve to excuse him.\*

## XVII.

1391. *A Lawsuit between the Minor and the Next of Kin to his Tutor.*— If the minor happens to have a considerable lawsuit against the father or mother, brothers, sisters, or nephews, of the person who is named to be his tutor, both humanity and the interest of the minor do require that the said person be excused from being tutor. For he ought not to be engaged in a guardianship which will oblige him to go to law with his nearest relations; and the minor ought to have a tutor who may be under no temptation to betray his trust.<sup>b</sup>

## XVIII.

1392. *Excuse on Account of Privilege.*— Persons who, on account of their employment or for other causes, are privileged with an exemption from being tutors, shall be excused from the office; which depends either on the nature of the employments, if they be such as in their own nature ought to give an exemption from the office of tutor, such as an embassy, the command of an army or garrison, or on the particular grant of the said privilege by some declaration or edict.<sup>c</sup>

\* L. 6, § 18, *D. de excus.*; — § 4, *Inst. de excus. tut. vel curat.*; — l. 21, *D. eod.*; — l. 16, *C. eod.* See the following article, and the remark upon it.

<sup>b</sup> L. 23, *C. de excus. tut.* It is to be observed on this article, that it is by the circumstances that we are to judge whether the lawsuit be such as that it ought to serve as an excuse, or that it would be sufficient to name a curator or substitute tutor to take care of such lawsuits, instead of the tutor. For it is our usage in such cases, and even when the lawsuit is between the minor and the tutor himself, that if the said lawsuit be not of such consequence as to be sufficient to excuse the tutor from the office, to name a curator to defend the minor against the tutor, or against the other persons whom the tutor ought not, in humanity, to be obliged to go to law with. See the eleventh article of the second section.

<sup>c</sup> V. l. 6, § 1, *et seq. D. de excus.* It is to be observed with respect to these kinds of exemptions mentioned in this law, that in France no persons are exempted from the office of tutor, except they be entitled to this privilege by some edict or some declaration.

## XIX.

1393. *Ecclesiastics are exempted from being Tutors.* — Ecclesiastical persons cannot be named tutors or curators. For the holiness of their sacred function obliges them, that they may be the better able to attend the duties of it, to disengage themselves from all other cares; and exempts them from all engagements to an administration of temporal concerns. But if a clergyman be willing to take charge of the education and government of orphans that are his relations, it shall be lawful for him to accept of the tutorship of them, that he may take care of their persons, and occasionally, likewise, of their estate, which has so necessary a connection with their persons.<sup>d</sup>

## XX.

1394. *Poverty and Want of Industry may serve as an Excuse.* — If he who is called to the office of a tutor has not an estate sufficient to bear the charges of it, if he can neither read nor write, or if he is not industrious enough to manage his own concerns, or if his own affairs demand his whole time and labor, he may be either excused from the tutorship or confirmed in it, according to the quality of the persons, the nature of the estate, and the other circumstances.<sup>e</sup>

## XXI.

1395. *The Tutor who is named ought to act till he is discharged.* — Although he who has been named tutor appeals from his nomination, and he has a just excuse, he shall nevertheless be bound as tutor till he is discharged of the trust; and he is obliged to act provisionally in the mean while till his appeal be determined.<sup>f</sup>

## XXII.

1396. *Acceptance of the Tutorship cuts off all Excuses.* — If he who had an excuse has accepted of the tutorship, or acted voluntarily as tutor before he gave in his excuse, he cannot be afterwards admitted to excuse himself.<sup>g</sup>

<sup>d</sup> L. 52, C. de episc. et cleric.; — Nov. 123, c. 5.

<sup>e</sup> L. 6, § ult. D. de excus.; — § 8, Inst. eod.; — ll. 7, 40, § 1, eod.; — § 8, Inst. eod.

<sup>f</sup> L. 31, D. de excus.; — l. 20, D. de adm. et per. tut.; — l. 39, § 6, eod.; — v. l. 16, C. de excus. tut.

<sup>g</sup> L. 2, C. si tutor. vel cur. fal. alleg. exc. sit; — l. 17, § 5, D. de excus.

## XXIII.

1397. *Incapacity that happens after the Nomination.* — If, after that the tutor has accepted of the tutorship, he falls under some incapacity, as if he becomes blind, deaf, dumb, if he runs mad, or is seized with other infirmities which render him incapable of exercising the office of tutor, he shall be discharged from it, and another tutor will be named in his place.<sup>a</sup>

## XXIV.

1398. *Privilege acquired after the Nomination.* — The privileges which one acquires after his nomination to the tutorship do not excuse him from it. For they are granted only to exempt those who are not as yet under any engagement. Thus, he who has been prevented by his nomination before he acquired the privilege cannot plead his privilege in order to be discharged.<sup>1</sup>

## XXV.

1399. *An Excuse happening after the Tutor's Entering upon his Office.* — The grounds of excuses which do not proceed from an incapacity, and which happen only after the nomination of the tutor, will not procure him his discharge from the office. Thus, the number of children which serve as an excuse, or the age of seventy years being completed after he has entered upon the administration of the tutorship, will not excuse him from it.<sup>1</sup>

## XXVI.

1400. *When the Tutor and Minor have different Places of Abode.* — It is not always a lawful ground of excuse for him who is named tutor, not to be an inhabitant of the place where the minor has his abode. For it may happen that, in the place where the minor lives, there is nobody capable of being named tutor. And besides, it may be reasonable and advantageous to the minor not to stand upon the distance between his domicile and that of his tutor, provided it be not such as to render the administration too difficult, and too chargeable either to the minor or tutor. So that it is by the circumstances that we are to judge of the regard that ought to be had to the distance of their dwellings.<sup>m</sup>

<sup>a</sup> L. pen. D. de tut. ; — l. 40, D. de excus.      <sup>1</sup> L. 28, D. de excus. ; — v. l. 7, D. de jud.

<sup>1</sup> L. 2, § 4, D. de excus.

<sup>m</sup> L. 32, D. de test. tut. ; — l. 10, § 4, D. de excusat. ; — l. ult. § ult. D. eod. See the third article of the first section.

## XXVII.

1401. *Several Excuses whereof none is sufficient of itself.*— If he who is named tutor has no ground of excuse which is of itself sufficient, such as the age of seventy years complete, or the number of children that is required; but that he is only, for example, sixty years of age, and has two or three children; these excuses, of which every one is insufficient by itself, will not be sufficient, when put all together, to procure him a discharge from the tutorship.<sup>a</sup>

## TITLE II.

## OF CURATORS.

1402. *Usage as to Curators.*— *Curator of one that is Mad or Infirm.*— As there are other causes besides the infirmity of age which render persons incapable of governing themselves and their affairs, such persons who happen to be in that condition are put under the conduct of others, who are to them instead of tutors, and who are called *curators*. Thus, curators are appointed to persons that are mad, and to those who, because of some infirmity, are incapable of managing their own concerns; such as, for instance, those who are both deaf and dumb.

1403. *Curator of a Prodigal.*— Among persons incapable of governing themselves we reckon prodigals, who lavish away their estates in foolish and idle expenses. And the same reason which obliges the public to take the management of their estates out of their hands makes it necessary to give them curators to look after their concerns.

1404. *Curator to a Minor who has a Tutor.*— Sometimes, likewise, a curator is assigned to a minor who has a tutor, when it happens that the tutor and minor have some difference or some right to be adjusted between them.<sup>a</sup>

<sup>a</sup> L. 15, § 11, *D. de excusat.* But if this tutor were sixty-nine years of age and had four children, would it not be as just, or rather more so, that he should be discharged, than if he were seventy years of age and had no children, or only forty years, with five children?

<sup>a</sup> See the eleventh article of the second section of *Tutors*, and the preamble to the seventh section of the same title.

1405. *Curator to Goods which are not claimed by any Owner.* —

There is yet another sort of curators, the use of which is necessary for taking care of goods that are abandoned, and which no person looks after. As in the case of a long absence of any one from his estate, without committing the care of it to any body; or in the case of an inheritance without heirs, or which the heirs have renounced; or if a debtor relinquishes all his estate to his creditors. In all these cases, and others of the like nature, where goods are without any owner, or without any person to look after them, curators are appointed to take care of them, and to preserve them for the use and benefit of those who either have or shall have a right to them.

1406. *The Subject-Matter of this Title.* — All these kinds of curators being charged with the goods and affairs that are committed to their care, and some of them likewise with the care of persons, such as the curators of those who are mad; their trust is of the same nature, and subject to the same rules, with that of tutors, in what relates to their engagement, the reasons that may serve to excuse them from the office, and all other things that are common to both offices. So that we must add to this title the rules of the foregoing title which may be applied to this.

1407. *Another Sort of Curators which does not belong to this Place.* — We do not place among the number of curators that are to be treated of under this title, those who are named in criminal prosecutions in certain cases against the memory of persons who are prosecuted after their death; such as those who have been killed in a duel, and who have made way with themselves. For the functions of these curators are of another kind, and belong to the matter of crimes, which does not belong in this place.

## SECTION I.

OF THE SEVERAL SORTS OF CURATORS, AND OF THEIR POWER.

### ART. I.

1408. *Curators of Madmen.* — Madmen being incapable of governing their persons and estates, although they be of age, curators are appointed to take care of them.\*

\* § 4, *Inst. de curat.*; — § 3, *cod.*; — l. 1, *C. de cur. fur.*; — l. 7, *D. cod.*

## II.

1409. *When a Minor is Mad.* — A curator is not assigned to any one as a madman, unless he has attained the age of majority. For if a minor be in a state of madness, it is sufficient, and likewise more decent, to appoint him a curator on account of his minority, rather than because of his madness; at least till he arrive at the years of majority.<sup>b</sup>

## III.

1410. *The Madness ought to be judicially proved.* — The madness of a person of full age ought to be proved judicially, in order to his having a curator assigned him. For, besides that it is only by the authority of justice that a curator can be appointed, it may sometimes happen that a person may counterfeit himself to be mad for some particular end,<sup>c</sup> or that others out of interest may represent him to be mad without any ground.

## IV.

1411. *The Son may be Curator to his Father or Mother, if they are Mad.* — The son may be named curator to his mother who is mad; as also to his father in the same case.<sup>d</sup>

## V.

1412. *When a Son, living under the Father's Jurisdiction, is Mad.* — If a son, who is still under his father's jurisdiction, falls into a state of madness, no curator is assigned him, because his father is naturally charged with the government of his person and the administration of his estate.<sup>e</sup>

## VI.

1413. *The Husband cannot be Curator of his Wife that is Mad.* — In the cases where it may be necessary to name a curator to a married woman, or to her who is contracted in marriage, whether it be on account of madness or for other causes, neither the husband,<sup>f</sup> nor the person with whom she is contracted,<sup>g</sup> can be named curators.

<sup>b</sup> L. 3, § 1, D. de tutel.

<sup>c</sup> L. 6, D. de cur. fur. et al.

<sup>d</sup> L. 4, D. de cur. fur.; — l. 1, in fine, D. eod.; — l. 2, eod.

<sup>e</sup> L. 7, C. de cur. fur. See the tenth article of the first section of Tutors.

<sup>f</sup> L. 2, Cod. qui dare tut.; — l. 14, D. de curat. fur.; — § 19, Inst. de excus. tut.

<sup>g</sup> L. 1, § ult. D. de excus. tut. This rule seems to be founded either on the interest



## VII.

1414. *Madness with lucid Intervals.*—The curator of a person whose madness comes and goes by intervals does not exercise his function but during the fit of madness, and ceases to exercise it in the lucid intervals, when the person's reason is fully reëstablished; but the office of this curator lasts during the life of the person that is mad, to avoid the trouble of naming a curator at every new fit of madness.<sup>h</sup>

## VIII.

1415. *Infirmities which require a Curator.*—Curators are given to all persons who, by reason of some infirmity, are incapable of the administration of their estates and affairs; such as one who is deaf and dumb; and all those who by other the like infirmities are brought under the like incapacity.<sup>1</sup>

## IX.

1416. *Curators of Persons who are declared Prodigals.*—Those who lavish away their estates in foolish, extravagant expenses, and whose bad conduct makes it necessary to declare them prodigals, and to interdict them judicially, are deprived of the administration of their affairs, and of the management of their estate, the charge of which is committed to a curator. And the same course would be taken with a woman whose manners and conduct should give occasion to such an interdiction.<sup>1</sup>

which the husband may have in the affair, which should require the appointment of a curator to his wife, or upon the inconveniences of making the husband accountable to his wife. And with respect to the person with whom the woman is contracted in marriage, the same reasons do likewise extend to him, because the intended marriage may take effect. And if the marriage does not take effect, there would be still less reason that the person to whom the woman was betrothed should be her curator.

We do not assign a curator to a married woman that is mad, for the administration of the effects pertaining to her dowry, for that administration belongs to the husband, who has a right to the enjoyment of them. See the third article of the first section of the title of *Dowries*.

<sup>h</sup> L. 6, C. de curat. fur.

<sup>1</sup> L. 2, D. de curat. fur.; — § 4, Inst. de curat.; — l. 19, in fine, ll. 20, 21, D. de reb. auth. jud. possid.; — l. 12, D. de tut. et curat. dat.

<sup>1</sup> L. 1, D. de curat. fur.; — l. 12, § ult. D. de tut. et cur. dat.; — l. 15, D. de cur. fur. By the ordinances of Blois, art. 182, widows who, having children by a former marriage, marry again with persons beneath their quality, are put under an interdiction as to the disposal of their estates, which they can neither sell nor alienate. But this interdiction being only to hinder alienations, in order to preserve the estate to the children, it hath not the effect to make curators be assigned to those women.

## X.

1417. *A Prodigal ought to be proved such.*—The interdiction of a prodigal cannot be decreed, and a curator assigned to him, till after his bad conduct shall have been proved.<sup>m</sup> And he whom his father shall have declared a prodigal in his will is presumed to be such;<sup>n</sup> unless it should appear by the circumstances that no regard ought to be had to such a declaration.

## XI.

1418. *The Son cannot be Curator to his Father who is a Prodigal.*—The son cannot be named curator to his father, who is declared a prodigal, although he may be curator to his father who is mad.<sup>o</sup>

## XII.

1419. *Duration of the Curatorship of a Prodigal.*—The office of a curator to a prodigal is not at an end till the interdiction is judicially taken off.<sup>p</sup>

## XIII.

1420. *Curator to the Effects of one that is absent.*—If any person happens to be long absent, without committing to any one the care of his effects and affairs, and it be necessary that somebody should look after them; in that case a curator is named to take care of them.<sup>q</sup>

## XIV.

1421. *Curator to a Child that is yet unborn.*—If a widow happens to be big with child at the time of her husband's death, a tutor cannot be named to the child till it is born. But if it be necessary, a curator is appointed to look after the rights of the child

<sup>m</sup> L. 1, *D. de cur. fur.*

<sup>n</sup> L. 16, § ult. *cod.*

<sup>o</sup> L. 1, § 1, *D. de curat. fur.*

<sup>p</sup> L. 1, *D. de curat. fur.* Although it be true that the amendment of the manners of a prodigal, as well as the return of a madman to his right senses, puts them both in a condition to resume the care of their affairs; yet it is necessary, however, with respect to the prodigal, that, as he has been judicially interdicted, so the interdiction should be judicially taken off, as well for the discharge of his curator as for the security of those who shall have business to transact with him.

<sup>q</sup> L. 6, § ult. *D. de tut.*;—l. 3, *C. de postlim. revers.*;—v. l. 6, § ult. *D. quibus ex caus. in ppe. tut.*;—l. 16, *D. ex quibus caus. maj.*;—l. 22, § 1, *D. de rebus auct. jud. possid.*;—l. 4, *Inst. de curat.*

that may be born, and to take care of the effects which are to be his as soon as he is born.\*

## XV.

1422. *A Curator to a Succession.* — If a succession happens to be without heirs or executors, as if the deceased left behind him no relations, nor instituted any person his executor by will, or he who had a right to succeed had renounced the succession or were absent, or during the time he was deliberating about accepting the succession, and refused in the mean while to intermeddle, it should be found necessary to appoint some person to look after the affairs and to take care of the goods; a curator, in this case, is named to the succession, who is to exercise that function, for the preservation of the goods, either for the benefit of the creditors, or of those to whom the succession shall appertain.<sup>a</sup>

## XVI.

1423. *Curator to Goods relinquished by a Debtor to his Creditors.* — When a debtor relinquishes his effects to his creditors, they may procure a curator to be appointed, to take care of them,<sup>b</sup> or they may name some of their own number to have the direction of them.

## XVII.

1424. *A Creditor may be Curator to the Goods of his Debtor.* — We may name for a curator to the goods relinquished by a debtor, or to his inheritance after death, one of his creditors, or some other person, to take care of the estate.<sup>c</sup>

## XVIII.

1425. *Power of Curators.* — Curators have their functions regu-

<sup>a</sup> L. 20, D. de tut. et curat. dat.; — l. 8, D. de curat. fur.; — l. 24, D. de reb. auct. jud.; — v. tit. de ventre in poss. mit. et curat. ejus; — l. 1, §§ 17 et 18, eod. If there were other children, and it were necessary only to have one tutorship for them all, the same tutor would serve to look after the interest of the children to be born.

<sup>b</sup> L. 8, D. quib. ex caus. in poss. eat.; — l. 3, D. de curat. fur.; — l. 22, § 1, D. de rebus auct. jud. poss.; — toto tit. D. de curat. bon. dando. See the following articles.

<sup>c</sup> L. 2, et toto tit. D. de curat. bon. dando. See the following article.

<sup>d</sup> L. 2, § 4, D. de curat. bon. dand.; — ll. 8 et 9, D. quibus ex caus. in poss. eat. We must not confound these sorts of curators or directors, which are mentioned in this and the foregoing article, with the curators who are named for the validity of a seizure of goods that are abandoned, such as an inheritance without heirs. For as to this last sort of curators, creditors are not named, because that would be to make them both plaintiff and defendant in the same cause.

lated by the power which is given to them, and they have a right to do every thing that their office requires.<sup>a</sup>

## SECTION II.

### OF THE ENGAGEMENTS OF CURATORS.

#### ART. I.

1426. *Oath and Administration of Curators.* — All these sorts of curators, of which mention has been made in the foregoing section, are bound, in the same manner as tutors, to take an oath faithfully to discharge their trust, to make an inventory of the goods committed to their charge, and to take the same care of every thing belonging to their administration as tutors are bound to do in relation to theirs.<sup>a</sup>

#### II.

1427. *Difference between Tutors and Curators.* — There is almost no other difference between the engagements of curators and tutors, except that tutors are named both for persons and for the estate belonging to the said persons, and that their administration never lasts longer than till the majority of the persons committed to their charge; whereas some curators are appointed only for goods, and the duration of their office is not limited to any time, but continues or ends according as the cause which has given occasion to their nomination continues or ceases.<sup>b</sup>

#### III.

1428. *Engagements of Curators.* — The rules which have been explained in the title of *Tutors*, and which may agree to the functions and engagements of curators, ought to be applied to them. As, for example, that they cannot take assignments to rights or debts against those whose curators they are; that their estates are mortgaged, from the day of their nomination, for the sums for

<sup>a</sup> L. 2, § 1, *D. de curat. bon. dando.* See the third article of the second section.

<sup>b</sup> L. 7, § 5, *C. de cur. fur.*; — Nov. 72, c. ult.; — d. l. 7, § 6, in f.; — l. 13, *D. de excus.*; — l. 33, *D. de admin. et per. tut. et cur.* See the law quoted upon the second article of the following section. See the twelfth article of the first section of *Tutors*, and the third article of this section.

<sup>c</sup> L. 13, *D. de excus.* See the preceding section

which they shall be found to be accountable; that they cannot alienate any part of the estate of those committed to their charge, without observing the formalities prescribed by law. And so it is with respect to the other rules, where the dispositions and motives of the said rules may have any relation to the office of curators.<sup>a</sup>

### SECTION III.

OF THE ENGAGEMENTS OF THOSE TO WHOM CURATORS ARE ASSIGNED.

#### ART. I.

1429. *Action of Curators appointed to Persons.*—The curators which are appointed for persons, and for the goods belonging to the said persons, have their action for recovering what shall be due to them, and for indemnifying them for all that they shall have well transacted, and for the other consequences of their administration; either against the persons themselves to whom they have been curators, if they are capable of auditing their accounts, or against their heirs and executors, or other persons to whom the said account ought to be rendered.<sup>a</sup>

#### II.

1430. *Action of Curators appointed to Goods.*—The curators whose administration relates only to goods, and not to persons, have their action against the persons who are interested in the preservation of the said goods; as, for instance, against the persons who shall be declared heirs to a succession that hath lain vacant for some time, and against the creditors of goods that are relinquished by the owner.<sup>b</sup>

#### III.

1431. *Action of the Curator to the Goods of an Absent.*—The curator appointed to look after the goods of an absent hath his action against the said person when he returns, or

<sup>a</sup> Novel. 72, c. 5, in fine;—l. 7, § 6, *D. de cur. fur.*;—l. 11, *D. de reb. act. et sub. tut.* See in the title of *Tutors* the rules which may agree to curators.

<sup>b</sup> l. 1, § 2, *D. de cont. tut. et ut. act.*

<sup>c</sup> l. 2, § 1, *D. de cur. bon. d.*

those to whom the goods shall belong, and that with much more reason than he who of his own accord takes upon him the care of the goods of an absent person.<sup>a</sup>

## IV.

1432. *Action of a Curator whose Charge is at an End.*—If a curator having acted, another be named in his stead, whether it be that the former ceases to be curator because of his excusing himself, or for other reasons, he shall have his action for what he has acted against the persons interested in the affairs that have been committed to his administration, and whom his nomination has put under an engagement to him; and he may likewise bring his action against the curator who is named in his room, who will intimate it to the persons concerned.<sup>d</sup>

## V.

1433. *Effect of the Action which Curators have.*—By this action the curators recover all that they have reasonably laid out of their own, with the interest of the money which they have advanced, if they have advanced any; and what may be due to them on the score of salary for their administration. And they procure a ratification of what they have transacted honestly and well.<sup>e</sup>

## VI.

1434. *Mortgage which Curators have for their Security.*—The curators of madmen, of those laboring under any infirmity, of prodigals, and absent persons, have their mortgage on all the estate belonging to the persons to whom they have been curators. And the curators to vacant successions, and other estates, have their mortgage on the estates that have been committed to their administration.<sup>f</sup> And all these curators have likewise their privilege and preference on the goods which they have recovered, or preserved, for the money which they have laid out to that end; as, for example, for the charges of a lawsuit for recovering a debt, or for the charges of repairing a house, or other tenement.<sup>g</sup>

<sup>a</sup> See the second article of this section. *Inst. de obl. quæ quasi ex contr.*; — l. 5, *D. de obl. et act.* See the second section *Of those who manage the Affairs of others.*

<sup>d</sup> This is a consequence of the foregoing articles.

<sup>e</sup> See the first, second, third, and fifth articles of the fifth section of the title of *Tutors.*

<sup>f</sup> See the sixth and seventh articles of the fifth section of *Tutors*, and the twenty-fifth article of the fifth section of *Paupers and Mortgages.*

## TITLE III.

## OF SYNDICS, DIRECTORS, AND OTHER ADMINISTRATORS OF COMPANIES AND CORPORATIONS.

1435. *Of Communities and Corporations, and of the Persons appointed to have the Direction of their Affairs.* — We have seen, in the title of *Persons*, that there are communities and corporations, ecclesiastical and secular, such as chapters, religious houses, corporations, and communities of towns, universities, companies of trades, and others of the like nature; and that these communities are considered as holding the place of persons. For as particular persons have their rights, their privileges, their estates, their affairs, their burdens, so these communities have likewise theirs; but with this difference among others, that whereas every particular person is master of what belongs to him, and disposes of it solely according to his own will and pleasure, if there be no obstacle in the way, such as a minority, or some other incapacity, no one of the particular persons who compose those communities, nor the whole body together, have that right; nor can they dispose in the same manner of what belongs to the community. Thus, they cannot alienate their estate, except for just causes, and according to the formalities prescribed by law. Which is founded upon this, that those communities being erected, whether they belong to the church or state, with a view of promoting thereby the public good, which requires that they should always subsist, it is necessary that they should not be at liberty to alienate their estates without just cause, that they may be able always to maintain and support themselves, and that they may not have it in their power to ruin this foundation, which makes them to subsist for the public good.

1436. *The Subject-Matter of this Title.* — It is a necessary consequence of these several establishments of communities, both in church and state, that, for the management of their affairs, for the preservation and administration of their estates and rights, they may appoint persons to take care of them. And these persons are called by different names, such as mayors, sheriffs, or aldermen in towns, governors, syndics, directors, administrators, or by other names, in the other corporations. And there is formed between those persons and the corporations who name them a mutual

engagement without any covenant; for such nominations are often made without the previous consent of the persons who are chosen. Thus, this kind of engagement being formed without a covenant, it is one of the matters to be treated of in this book, and shall be the subject-matter of this title.

1437. We must not confound this engagement with that which is formed between such corporations or communities, and those whom they appoint their proctors or agents in any business; for this engagement is made by covenant, and is comprehended in the matter of the title of *Proxies*.

1438. We shall not speak here of the other matters which may relate to communities, such as their use, their origin, the manner in which they are formed, their rights, their privileges, and the rest; for these matters do not belong to this place, but are a part of the public law, of which mention has been made in the fourteenth chapter of the *Treatise of Laws*, No. 27. But the subject-matter of this title is restrained to what relates in general to the nomination and power of those syndics, or governors, and directors, and the engagements which are formed between them and the persons who name them, in what relate to the affairs with which they are charged.

## SECTION I.

OF THE NOMINATION OF SYNDICS, DIRECTORS, AND OTHER ADMINISTRATORS OF COMPANIES AND CORPORATIONS, AND OF THEIR POWER.

### ART. I.

1439. *Use of Syndics and other Directors.*—Those who have permission to form a company or corporation have also their rights, their privileges, their goods, their affairs; and all the members not having leisure to attend at the same time the business of the community, they may appoint persons to take care of it, who are called syndics, or by some other names.\*

### II.

1440. *By whom they are named.*—The syndics and other direc-

\* L. 1, § 1, D. *quod cui. un. nom.*



tors of the affairs of companies and corporations are named by the members of those communities, unless some particular law hath otherwise provided for the choice of the said persons. And if the corporation be such, that all who are members of it cannot meet together, or ought not all of them to have a share in the direction of the common affairs, they choose a certain number of the members, according as it is provided by the regulations and usage of the community; and that number, which represents the whole body, names those who are to be intrusted with the care of the affairs.<sup>b</sup>

### III.

1441. *In what Manner they are named.*—The nomination of such governors and directors is made by plurality of voices, when those who have a right to vote are assembled in the manner and in the number prescribed by the rules or custom of the community, as if it be necessary that there should be two thirds of the members present, or any other proportion, or a certain number; and those who have a right to vote in the nomination ought to observe therein the formalities which are prescribed them.<sup>c</sup>

### IV.

1442. *The Person who is named is reckoned in computing the Number of the Votes.*—To make up the number of voters that is necessary in such nominations, we may reckon the person who is named, if he was of the number of those who assisted at the nomination.<sup>d</sup>

### V.

1443. *The Power of him who is named.*—Those who have been thus legally nominated have the power of exercising the functions which are committed to them; and that according to the extent or bounds that are prescribed to them.<sup>e</sup>

### VI.

1444. *Duration of this Power.*—The power of those syndics and other administrators ends with their offices when they expire.

<sup>b</sup> L. 3, D. *quod cui. un. nom.*;—l. 14, D. *ad munic.*;—l. 6, § 1, in f. D. *quod cui. un. nom.*

<sup>c</sup> L. 19, D. *ad municip.*;—l. 3, D. *quod cui. un. nom.*

<sup>d</sup> L. 4, D. *quod cui. un. nom.*

<sup>e</sup> L. 1, § 1, in f. D. *quod cui. un. nom.*

And it ceases also by a revocation, if that can take place; provided it be done according to rule, and be known to the person who is revoked, and to those who had business with him.<sup>f</sup>

## SECTION II.

### OF THE ENGAGEMENTS OF SYNDICS AND OTHER DIRECTORS.

#### ART. I.

1445. *The Care of Syndics and Directors.*—Those who are named by companies and corporations to have the direction of their affairs are obliged to the same care and diligence as factors or agents. And they are answerable, not only for any fraud and gross negligence which they may be guilty of, but also for all faults that are contrary to the care required of them.<sup>a</sup>

#### II.

1446. *Their Engagements.*—The syndics, and other directors, who undertake an affair by order of the community which has named them, are obliged to take care of all the consequences of it. Thus, he who is ordered to commence a lawsuit is bound to prosecute it in all its consequences during the continuation of his administration. And, in general, he is obliged to answer for his conduct to those who have employed him, and to show his warrant and authority to those whom he sues or with whom he treats, and to procure from the community a ratification of what he shall have transacted.<sup>b</sup>

#### III.

1447. *Other Engagements.*—The other engagements of these syndics and directors are pointed out to them by the functions which are committed to them, and by the power which is given them. Thus, those of mayors and sheriffs are regulated by the nature of their offices; and those of a syndic, or other governor

<sup>f</sup> L. 6, § 2, *D. quod cui. un. nom.* See the first article of the fourth section of *Proxies*.

<sup>a</sup> L. 6, § 3, *D. quod cui. un. nom.*; —l. 6, *D. de adm. rer. ad civ. pert.* See the fourth article of the third section of *Proxies*. This obligation hath not its effect against the superiors and procurators of convents, who are persons civilly dead, against whom the community hath not this recourse.

<sup>b</sup> L. 6, § 3, *D. quod cui. un. nom.*

and director of a chapter, or other corporation, by the power and functions which are appointed them. And, in general, all overseers and administrators have the functions proper to their offices, according as they are either settled by the rules and usage of the society, or particularly committed to them by those who name them.<sup>a</sup>

### SECTION III.

OF THE ENGAGEMENTS OF CORPORATIONS AND COMMUNITIES WHO COMMIT THE ADMINISTRATION OF THEIR AFFAIRS TO SYNDICS, DIRECTORS, OR OTHERS.

#### ART. I.

1448. *Engagement to ratify what their Syndics or Directors do.* — The corporations and communities which have named syndics or other directors for the administration of their affairs are bound to ratify what they have well transacted pursuant to their power. For seeing all the members of the community cannot act in a body together, nor even know all of them the concerns of the community, it is presumed that they know as much of their affairs as the person does whom they have intrusted to the management of them; that whatever comes to his knowledge comes likewise to theirs; and that what he does, or what is transacted with him, is transacted with all the members of the community, provided it be within the bounds of the power which they have given him.<sup>a</sup>

#### II.

1449. *Engagement to allow the Expenses.* — The community is obliged to allow to the person whom it has constituted its syndic or director, the reasonable charges which he has been at for the affairs committed to his care.<sup>b</sup>

#### III.

1450. *Bounds of the Engagements of Communities.* — Communities are not bound by the act of the person to whom they have

<sup>a</sup> L. 6, § 3, *D. quod cui. un.*; — l. 5, *D. mand.*; — l. 2, § 1, *D. ad munic.*; — l. 17, § 7, *cod.*; — l. 8, *D. de mun. et bon.*; — tit. *D. de adm. rer. ud civ. pert.*

<sup>b</sup> L. 7, *D. quod cui. un. nom.*; — l. 14, *D. ad municip.* See the fifth article of the second section of Covenants.

<sup>c</sup> L. 7, *D. quod cui. un. nom.*

committed the direction of their affairs, except within the limits of the engagements which they are empowered to contract, and according as they are advantageous to the community. Thus, for example, if a community has given power to borrow money, it will not be obliged except for such sums as have been usefully employed for its behoof; or if it has given a power to sell, the sale will not subsist, except where it has been made for a necessary cause, and where the formalities prescribed in such sorts of sales have been observed.<sup>a</sup>

## IV.

1451. *How Directors or Administrators of Communities may be bound in their own Names.*—If a community be discharged from the engagement contracted by the person whom it has intrusted with the administration of its affairs, we are to judge by the circumstances whether the administrator ought in his own person to make good the engagement to those who have treated with him. Thus, for example, if the magistrates of a town have borrowed money to pay their debts, or to be laid out to some other use for the benefit of the corporation, and the creditor trusts the money with them, they may pay the debts, or lay it out to the other use; if they have failed to employ this money for the behoof of the public, they must answer for it in their own names. This, on the contrary, if the director or administrator of a community sells an estate belonging to it to a purchaser who asks no other security than an order of the community empowering the said person to sell, and the sale be made by the said person in that quality, and pursuant to the power granted him, and afterwards the said sale comes to be annulled, for having been made without necessity, and without observing the usual formalities, the said director or administrator shall not be bound to warrant the sale. Thus, in general, directors or administrators who treat for communities are bound for what is their own particular act and deed to those who have trusted to their integrity, but are not bound for the act of the community, if they have acted only in conformity to the power which it gave them.<sup>b</sup>

<sup>a</sup> L. 27, D. de reb. cred.; — l. 11, D. de pig. et hyp.

<sup>b</sup> V. l. 14, C. de sacr. eccles.; — Nov. 7, c. 1; — Nov. 120. See the following article.

<sup>c</sup> L. 27, D. de reb. cred. See the preceding article touching alienations, and the remark on the first article of the second section, concerning the engagements of syndics and directors.

## V.

1452. *The Engagement of a Community is not divided among all the Members.*—The engagement of a corporation or community is not divided among the persons who compose it, so as to become the engagement of every one of the members in particular; and it is only the community that is bound by the act of the person to whom it has committed the administration of its affairs. And as the particular members do not enter in their own names into the obligation contracted by the community, unless they engage themselves expressly, so those who oblige themselves to communities do not by that engage themselves to every one of the members of the said communities in particular.<sup>f</sup>

## TITLE IV.

## OF THOSE WHO MANAGE THE AFFAIRS OF OTHERS WITHOUT THEIR KNOWLEDGE.

1453. *The Duty of taking Care of the Affairs of Absent Persons.*—*The Subject-Matter of this Title.*—The law which enjoins us to do for others what we would that they should do for us, obliges those who happen to be in a conjuncture where the interest of absent persons is abandoned to take what care of it they are able. The bare sentiments of humanity, not to speak of religion, recommend this duty towards absent persons, and engage those to look after their estates and concerns to whom the conjuncture of affairs has afforded an opportunity of so doing. And the Roman laws invite all sorts of persons to this duty; giving to those who take care of the affairs of absent persons an assurance, that what they shall have reasonably acted shall be confirmed, and that they shall be reimbursed the moneys which they shall have laid out to advantage.<sup>g</sup> It is this kind of office, and the consequences resulting from it, that the rules which are the subject-matter of this title have relation to. For there is formed an engagement without a covenant, and which is reciprocal,

<sup>f</sup> L. 2, D. quod cui. un. nom.; — l. 7, § 1, eod.

<sup>g</sup> L. 5 D. de obl. et act.; — § 1, Inst. de obl. quæ qu. ex contr. n.; — l. 5, D. de obl. et act.

between the master of an affair and the person who takes care of it without his knowledge. Thus this kind of engagement hath its rank in this place.

1454. It is to be observed as to this title, that there is this difference among others between the administration of tutors and curators, and that of persons who manage the affairs of others without their knowledge; that whereas tutors and curators, being named or confirmed by authority of justice, have their mortgage on the whole estate of the persons who have been under their care, and curators to goods upon the goods of which they have had the administration, those who manage the affairs of others without their knowledge have not the same privilege; but they have the preference which they may have acquired on account of moneys laid out, either for the preservation of a thing, or recovery of a debt.<sup>b</sup>

1455. Seeing there is a great resemblance between the engagement of those who manage the affairs of others without their knowledge, and that of factors or agents, we must join to this title the rules of the title of *Proxies* which are applicable to this subject.

## SECTION I.

OF THE ENGAGEMENTS OF HIM WHO DOES THE BUSINESS OF ANOTHER PERSON WITHOUT HIS KNOWLEDGE.

### ART. I.

1456. *Engagement to continue an Affair that is begun.* — The civil law obliges nobody to take care of the affairs of others, except those who are charged with them by reason of some particular duty, such as tutors, curators, and other administrators. But he who undertakes willingly the care of the affair of another person is not any longer at liberty to abandon it; for he shall be bound for the consequences of his administration to continue what he shall have begun till he has made an end of it, or till the master be in a condition to look after it himself; and he shall be accountable for what he shall have done, or neglected to do.<sup>a</sup> And the

<sup>a</sup> See the sixth article of the third section of *Curators*, and the fifth section of *Pawns and Mortgages*.

<sup>b</sup> *L. 20, C. de neg. gest. ; c. l. 21, § 2, D. eod. ; — § 1, Inst. de obl. quæ quasi ex contr. ; — l. 2, D. de neg. gest.*

person for whom he shall have acted shall on his part be bound to him in the engagements which shall be explained in the second section.

## II.

1457. *Care of an Affair which one has undertaken.*—He who has undertaken the affair of another person without his knowledge is obliged to take the same care of it as if he were constituted the other's agent or factor; for he is instead of one: and seeing he does a good office, he ought to do it so as that it be no ways prejudicial, either through his negligence or through any other fault. Thus, he shall be accountable, not only for any fraud or unfair dealing which he may be guilty of, but likewise for want of care. And even although he should be negligent in his own proper concerns, yet he is bound to take a very exact care of the affairs of another person which he has undertaken, and he will be answerable for the faults that are contrary to this care; unless the circumstances make it appear reasonable to abate something of the rigor, according to the rule which shall be explained in the last article of this section.<sup>b</sup>

## III.

1458. *If he who meddles with the Affairs of an Absent Person neglects some Part of them.*—If the person who has undertaken the management of the affairs of one that is absent neglects a part of them, and his taking the management upon him hinders other persons from looking after them, he shall be made accountable for the said neglect, according to the circumstances.<sup>c</sup>

## IV.

1459. *An Affair undertaken without Necessity.*—But if, on the contrary, he who manages the affairs of an absent person undertakes without necessity some new affair, which nothing obliged the absent person to engage in, as if he buys for him some merchandise, or engages him in some commerce, he alone shall bear all the loss that shall happen by this new business although the

<sup>b</sup> L. 20, C. de neg. gest.; — § 1, in f. Inst. de obl. que quasi ex contr.; — l. 24, C. de usur.; — l. 11, D. de neg. gest. See the fourth article of the third section of Proxies.

<sup>c</sup> L. 6, § 12, D. de neg. gest.; — v. l. 1, § ult. D. de eo qui pro. tut. prov. cur. neg. gestit. See the fifth article of this section.

profit that it may yield will belong to the absent person. But if there happens to be in the same affair loss one way, and gain another, he who has undertaken it may compensate the gain with the loss which he is to bear.<sup>d</sup>

V.

1460. *Of him who manages only one Affair.*—He who is not obliged to concern himself any ways in the affairs of another person may confine himself to one affair, and not meddle with the others, if there be no connection between them.<sup>e</sup>

VI.

1461. *Of Accidents.*—Although he who does the business of another have engaged himself in it of his own accord, yet he is not answerable for accidents, and for the other events which may render ineffectual the good office which he had done.

VII.

1462. *If the Absent Person dies before the Business is ended.*—If the absent person, whose business another hath undertaken, happens to die before the business be ended, or if he was already dead before the said person intermeddled with it, he will be obliged to continue his administration for the behoof of the heirs and executors, or other persons who may have an interest in the said affair; for it is a consequence of his engagement which we must consider in its origin, without regard to the change of masters that may happen.<sup>f</sup>

VIII.

1463. *Interest of Moneys received on Account of the Absent Person.*—If, in the administration of the affairs or estate of an absent person, there remains, after deduction of all necessary charges, any sum of money in the hands of him who has the management, and he convert it to his own use, or neglect to lay it out for the behoof of the owner, as if he fails to discharge a debt of the absent person, which carries interest; in these and the like cases, whether

<sup>d</sup> L. 11, D. de neg. gest.

<sup>e</sup> L. 21, § 2, D. de neg. gest.; — l. 16, eod.; — l. 20, C. eod. See the sixth article of this section.

<sup>f</sup> L. 22, C. de neg. gest.; — l. 22, D. eod. See the seventh article of the second section.

<sup>g</sup> L. 3, D. de neg. gest.; — d. l. 3, § 6; — l. 12, § ult. eod.; — l. 21, § 2, eod.



he was guilty of any unfair dealing or not, or of any negligence for which he might be blamed, he may be liable for the interest of the said sum, according to the quantity thereof, the time which he kept it by him, and the other circumstances.<sup>1</sup>

## IX.

1464. *Of him who manages the Affair of one Person, believing it to belong to another.* — If any one, through mistake, has managed an affair which he believed to be the concern of one of his friends, and it proved to be the affair of another person, there is no manner of engagement formed between him and his friend whom he thought the affair concerned; but only between the master of the affair and him, in the same manner as if he had known the truth.<sup>1</sup>

## X.

1465. *If a Woman manages the Affairs of an Absent Person.* — If a woman has taken upon herself the management of the affairs of another person without his knowledge, she will be accountable for them according to the foregoing rules; for although women cannot be named tutoresses or guardians, except to their own children, yet they enter into the engagements which may arise from an administration into which they intrude themselves.<sup>1</sup>

## XI.

1466. *Of those who act through Necessity.* — Those who through some necessity find themselves obliged to take upon them the management of the affairs of others, as is, for example, in certain cases, the heir or executor of a tutor or guardian,<sup>m</sup> enter into the same engagements as he does who intrudes himself into the

<sup>1</sup> L. 31, § 3, *D. de neg. gest.*; — l. 19, § 4, *cod.*; — v. l. 6, § ult. *cod.* We have added in this article for the interest which may be due according to the circumstances. For our usage is not the same with respect to interest as it was at Rome, where usury was permitted, and where the use of it was frequent and easy among the bankers, who drove a public trade of taking the money of particular persons upon interest. And this commerce was so established, that those who were under an obligation of improving the money for which they were accountable, such as tutors, were discharged, provided they gave it to a banker of undoubted credit, although it afterwards happened that he proved insolvent. V. l. 10, § 1, *D. de edend.*; — l. 24, § 2, *D. de reb. auct. jud. poss.*; — l. 7, § 2, *D. de pos.*; — l. 50, *D. de adm. et per. tut.*

<sup>1</sup> L. 5, § 1, *D. de neg. gest.*; — l. 45, § 2, *cod.*

<sup>1</sup> L. 3, § 1, *D. de neg. gest.*

<sup>m</sup> See the sixth article of the fourth section of *Tutors*.

business voluntarily. And they have likewise, on their part, the same actions against the persons whose affairs they manage, and that with much greater reason than he who engaged himself in the business without any necessity.<sup>a</sup>

## XII.

1467. *A Case where he who acts is not obliged to the most exact Care.* — Although those who intrude themselves into the affairs of others be bound regularly to a most exact care of them, according to the rule explained in the second article; yet, if the circumstances be such that it would be a hardship to require such an exact care of him who had managed the affair of another, some abatement might be made from the rigor of the law in this case, and he be made responsible only for such faults as might be imputed to a dishonest and unfair dealing. Which abatement ought to depend on the quality of the persons, on the tie of friendship or relation between them, the nature of the affair, the necessity there was to look after it, as if it was to prevent a seizure or sale of the goods of the absent person, on the difficulties which it may have been attended with, the conduct of the person who has taken upon himself the management, and on the other circumstances of the like nature.<sup>b</sup>

## SECTION II.

OF THE ENGAGEMENTS OF THE PERSON WHOSE BUSINESS HATH BEEN MANAGED BY ANOTHER, WITHOUT HIS KNOWLEDGE.

## ART. I.

1468. *The Foundation of the Engagements of him whose Affair hath been managed by another.* — He whose business another hath managed for him without his knowledge is bound to him in all that the consequences of what he has transacted may require.<sup>c</sup> And this obligation is contracted, although the person be ignorant of it, by the duty of gratitude for this good office, and comprehends the engagements which shall be explained in the following rules.

<sup>a</sup> L. 3, § 10, D. de neg. gest. ; — l. 18, C. de neg. gest.

<sup>b</sup> L. 3, § 9, D. de neg. gest.

<sup>c</sup> L. 1, D. de neg. gest. ; — § 1, Inst. de obl. qua quasi ex cont.

## II.

**1469. Engagement to ratify and execute what hath been well done.**—He whose affair hath been well managed is engaged to him who has taken care of it, to free and indemnify him as to the consequences of his administration; as, for instance, to pay for him what he has promised, to save him harmless from the engagements into which he has entered, and to ratify what he has well done.<sup>b</sup>

## III.

**1470. Reimbursement of Expenses.**—If he who has managed the affair of an absent person has laid out on it expenses that are necessary or useful, and such as the absent person himself would and ought to have done, he shall recover them.<sup>c</sup>

## IV.

**1471. Excessive Expenses.**—If in a necessary expense more hath been laid out than was necessary, it will be reduced to what ought to have been laid out on the business.<sup>d</sup>

## V.

**1472. Interest of Money advanced.**—If he who has laid out these expenses has been obliged either to borrow the money upon interest, or to advance it himself to his own loss, the master of the affair will be bound to pay the interest of the sums advanced, even although he who has advanced the money shall have been obliged through some necessity to take upon him the care of the said affair.<sup>e</sup>

## VI.

**1473. Unnecessary Expenses.**—The expenses which shall have been laid out imprudently for one who was not willing, or even not in a condition, to make them, will fall upon him who has expended the money of his own free motion. As if, for example, he has made in a house some useless repairs, or some change which

<sup>b</sup> L. 2, D. de neg. gest.; — l. 9, D. cod.

<sup>c</sup> L. 2, D. de neg. gest.; — l. 45, cod.

<sup>d</sup> L. 25, D. de neg. gest.

<sup>e</sup> L. 18, C. de negt. gest.; — l. 19, § 4, in f. D. cod.; — l. 37, D. de usu. See the fifth article of the fifth section of Tutors, and the eleventh article of the first section of this title.

the master was neither able nor willing to make; for he ought not to have engaged the master indiscreetly in an expense which would be burdensome to him.<sup>f</sup>

## VII.

1474. *If what hath been usefully done perishes by some Accident.*—If the expense has been necessary, and such as the master himself would have been obliged to make, and if, by some accident, what has been usefully done perishes, or is lost; the master shall nevertheless be bound to refund the money to the person who has laid it out, and who cannot be blamed for the loss of the thing. Thus, for example, if a friend of an absent person, whose house was in danger of falling, takes care to have it propped up, if he buys provisions necessary for the sustenance of his family, and the house or provisions perish by fire, or by some other accident, without any fault of the person who has done the said services, he will nevertheless recover the money which he had laid out on them.<sup>g</sup>

## VIII.

1475. *Approbation of what has been ill done.*—If he whose affair hath been managed by another has approved of what has been done, after having had information of the matter, he cannot afterwards complain of it, even although he should have reason not to approve it; unless some fraud be afterwards discovered, which did not at first appear.<sup>h</sup>

## IX.

1476. *Of Good Offices done out of Duty, or out of Liberality.*—The expenses which one person is at for another, out of a motive of liberality, or out of the duty of charity, cannot be recovered, and are not placed in the rank of expenses laid out by those who manage the affairs of others, in hopes of being repaid what they shall have advanced of their own. Thus, for example, if an uncle gives alimony to his niece, and he afterwards, repenting of his liberality, or of this duty to which his proximity of blood engages him, demands to be reimbursed of what he has laid out on this account, his demand will not be received. And it would be the

<sup>f</sup> L. 10, § 2, *D. de neg. gest.*

<sup>g</sup> L. 22, *D. de neg. gest.*; — l. 10, § ult. *D. cod.*; — d. l. 10, § 1, *D. cod.* See the thirty-fifth article of the third section of *Tutors*.

<sup>h</sup> L. 9, *D. de neg. gest.*

same thing, and with much more reason, in the case of a mother, who had maintained her own children. But if, besides their maintenance, the mother had likewise disbursed some money on their affairs, and it appeared that she did it with a view of recovering it, she may oblige her children to repay her.<sup>1</sup>

## X.

1477. *Exception to the foregoing Article.* — If any one has laid out for another those kinds of expenses which the duties of relation or charity require, and such as he may either do out of liberality, or with a design to recover what he shall have laid out; the intention of the person who has laid out the money will serve as a rule, either to oblige him for whose behoof the money has been laid out to repay it, or to discharge him of the said obligation. And we are to judge of this intention by the circumstances of the quality of the person, of their estates, of the precautions taken by him who lays out such kinds of expenses, and others of the like nature.<sup>1</sup>

## XI.

1478. *We ought to judge of such Kind of Expenses on the Circumstances.* — The greatest proximity of relation is not sufficient to found a presumption, that the expense which one has laid out for another was intended as a mere bounty. And although there has not been any protestation or declaration of a design to recover payment of what is advanced, yet, if it shall appear by the circumstances that there was no intention of giving it, the person who has laid out such expenses may demand to be reimbursed. Thus, for example, if a mother who took care of the estate and affairs of her children, or a grandmother of those of her grandchildren, had educated and maintained them, it would be presumed, in this case, that the intention of the said mother or grandmother was only to maintain her children or grandchildren out of their own estate, of which she had the administration; and the said expense would be allowed her, although she had made no protestation of her intention to recover it; and this would still admit of less difficulty, if she had kept an account of it with design to recover payment.<sup>2</sup>

<sup>1</sup> L. 27, in f. *D. de neg. gest.*; — L. 1, *C. de neg. gest.*; — l. 11, *C. eod.* See the two following articles.

<sup>2</sup> L. 16, *C. de neg. gest.* See the following article.

<sup>3</sup> L. 34, *D. de neg. gest.*

## TITLE V.

### OF THOSE WHO CHANCE TO HAVE ANY THING IN COMMON TOGETHER, WITHOUT A COVENANT.

1479. *Things belonging in Common to several Persons, without a Covenant.* — When one and the same thing happens to belong in common to two or more persons, without their entering into any covenant about it; such as an inheritance among coheirs, or a legacy of the same thing to several legatees; there is formed among them divers engagements, according as their common interests may require. Thus, he who has the thing belonging to them in common in his custody ought to take care of it; thus, they ought to reimburse one another of what has been laid out on its preservation; thus, they ought to make an equal partition of it. And it is these engagements, together with others of the like nature, which shall be the subject-matter of this title.

1480. A thing may belong in common to several persons two manner of ways. One is, when each of the partners has his right entire and undivided in the whole thing; thus, all the goods of an inheritance are in such a manner common to the coheirs, that every individual thing in the inheritance belongs to them all till the partition is made. The other way is, when every one of the persons to whom the thing belongs in common has his share or portion of it regulated, although the partition has not been made. Thus, a testator may devise to two persons a piece of land, of which he appoints to one legatee one half to be taken on one side, and to the other legatee his half to be taken on the other side; which will render common to them both at least that part of the land where the bounds must be settled for separating the one's share from the other. And there will be formed engagements between these persons; such as that of obliging them to come to a partition, and to make restitution of what the one may chance to owe to the other, on account of fruits which have been reaped out of the common estate.

1481. We shall not make mention here of the community of goods, which is established by several customs between husband and wife. For although this community be contracted without any express covenant, by the bare effect of the marriage; yet it is a matter which belongs properly to the said customs, which have

differently established the rules of it in different places; to which we may likewise apply the rules of this title, as also those of the title of *Partnership*, according as they are applicable to it.

1482. By what is said here, that the community of goods between husband and wife is a matter which properly belongs to the customs, is meant only that it is expressly established by several customs; which doth not hinder but that, in the other customs which make no mention of it, and in the provinces which are governed by the Roman law, the parties may agree, by contract of marriage, on a community of goods between husband and wife, as they might have done by the Roman law, as appears from the sixteenth law, § 3, *D. de alim. et cib. leg.* But that was a community, or partnership, settled by agreement; and seeing all these communities, whether settled by custom or agreement, have their rules either in the customs, or in the contract of partnership, and in general in the covenants of the agreement, there remains nothing of this matter which is necessary to be added to what has been explained in the title of *Covenants*, in that of *Partnership*, and in the present title.

## SECTION I.

HOW ONE AND THE SAME THING MAY BELONG IN COMMON TO SEVERAL PERSONS, WITHOUT A COVENANT.

### ART. I.

1483. *Donees or Legatees of one and the same Thing.* — A thing may be common to two or more persons, although they have not entered into any partnership, nor made any contract, nor done any thing on their part to make it common. Thus, two donees or legatees of one and the same thing have it in common among them, without partnership or covenant.<sup>a</sup>

### II.

1484. *Coheirs and Co-executors.* — The coheirs of one and the same inheritance, and co-executors of a will, are united by the

<sup>a</sup> *L. 31, D. pro socio*; — *l. 2, D. comm. divid.*; — *l. 32, D. pro socio*; — *v. § 3, Inst. de oil. que quasi ex contr.*; — *l. 25, § 16, in f. D. fam. erasc.* See the second article of the second section of *Partnership*.

rights and charges of the inheritance which they have in common. And the said union is formed without a covenant.<sup>b</sup>

### III.

1485. *The Heir or Executor of a Partner.*—The heir or executor of a partner is united without any covenant with the partners of the deceased to whom he succeeds; and although he be not a partner himself, yet this union is an effect of the right which he acquires in the thing that is common.<sup>c</sup>

### IV.

1486. *Purchasers of Shares undivided.*—He who purchases a share of a right, or other thing belonging in common to several persons, enters into their common ties and engagements, without partnership or covenant. And it is the same thing if several purchasers purchase every one of them singly and separately different shares, undivided, of one and the same thing.<sup>d</sup>

### V.

1487. *Engagements arising from the Community of a Thing.*—In the cases of the foregoing articles, and in all other events of the like nature, which render one and the same thing common to two or more persons without a covenant, there is formed among them divers engagements by the bare effect of their interest in the thing that is common to them. And these engagements shall be explained in the following section.<sup>e</sup>

## SECTION II.

OF THE MUTUAL ENGAGEMENTS OF THOSE WHO HAVE SOMETHING IN COMMON TOGETHER, WITHOUT A COVENANT.

### ART. I.

1488. *General Engagements of those who have a Thing in Common.*—The engagements of those who have something in com-

<sup>b</sup> L. 31, D. pro socio; — l. 25, § 16, D. fam. ercisc.

<sup>c</sup> L. 63, § 8, D. pro socio. See the third article of the second section, and the whole sixth section of Partnership.

<sup>d</sup> L. 31, D. si pro socio.

<sup>e</sup> § 3, Inst. de obl. quæ quasi ex contr.; — l. 32, D. pro socio; — l. 25, § 16, in f. D. fam.



mon among them without a covenant are, in general, to divide it when any one of the parties concerned desires it; to do one another justice as to the gains and losses; to account for the profits which they have made, and for the expenses laid out on the common thing; to answer every one for his own proper deed, and for the damage which he shall have occasioned to the common thing; according as these engagements and their consequences shall be explained in the rules which follow.<sup>a</sup>

## II.

1489. *Care of the Common Thing.*—While the thing belonging in common to coheirs or others remains undivided, the proprietor who has it in his custody is obliged to take the same care of it as if it were wholly his own; and he will be answerable, not only for all fraud and deceit which he shall be guilty of, but likewise for faults contrary to the care that is required of him. But he is not bound to the same diligence as he is who takes upon himself voluntarily the charge of the affair of another person; because, in the present case, it is his own interest which has engaged him in an affair in which he was concerned, and it is only by chance that he happens to be engaged in a thing in which another person has an interest. So that he is bound only to take the same care of the common thing as of his own proper concerns.<sup>b</sup>

## III.

1490. *Communication of the Profits.*—He who has had the enjoyment of the common thing ought to communicate all the fruits and all the profits which he has made by it. For without this communication, the equality which ought to be observed among all the copartners would be violated.<sup>c</sup>

## IV.

1491. *Reimbursement of Money advanced, with the Interest.*—If one of the proprietors of a thing or affair, that is in common among them, has been at any necessary expense about it, such as reparations, the charges of a lawsuit, and the like, he will recover

<sup>a</sup> L. 3, D. comm. divid.; — l. 4, in f. C. cod.; — l. 19, in f. D. fam. ercisc.

<sup>b</sup> L. 25, § 16, D. fam. ercisc.; — l. 6, § 11, D. comm. divid.

<sup>c</sup> L. 11, in f. D. comm. divid.; — l. 4, § 3, cod.; — l. 6, § 2, cod.; — l. 3, C. cod.; — d. l. in f.

the same, with interest from the time that he advanced the money.<sup>d</sup> For these expenses have preserved the thing, or have rendered it more valuable, and may have been chargeable to the person who has advanced the money.

## V.

**1492. Damage done to the Common Thing.**—Those who have an affair or other thing in common together are mutually accountable to one another for their management and their conduct in relation to it; and every one of them must answer for the damage or loss which they may have occasioned to the common thing.<sup>e</sup>

## VI.

**1493. One Proprietor cannot, without the Consent of the others, make any Innovation in the Common Thing.**—None of the proprietors of a common thing can make any change in it, without the approbation of all parties concerned; and any one of them alone may, in opposition to all the rest, hinder the innovation.<sup>f</sup> For every one of them is at liberty to preserve his right such as it is. But this is to be understood of changes which are not necessary for the preservation of the thing. For it would not be reasonable to let the thing perish through the caprice of one of the proprietors.

## VII.

**1494. The Penalty of making a Change against the Will of the other Proprietors.**—If one of the proprietors makes a change in the common thing without necessity, the other opposing it, he shall be obliged to restore things to the condition in which they were at first, if it can be done, and to make good all the damages which he shall have occasioned.<sup>g</sup>

## VIII.

**1495. If the Change has been suffered by the other Proprietors.**—If the change has been known and suffered, although without an

<sup>d</sup> L. 4, § 3, *D. comm. divid.*;—l. 11, *cod.*;—l. 31, § ult. *D. de neg. gest.*;—l. 67, § 2, *D. pro socio*;—l. 52, § 10, *cod.*;—l. 18, § 3, *D. fam. ercisc.*

<sup>e</sup> L. 14, *D. comm. divid.*;—l. 8, § 2, *D. cod.*;—l. 19, *C. fam. ercisc.*

<sup>f</sup> L. 28, *D. comm. divid.*;—l. 5, in *f. C. de auth. prast.* Although this text has relation to another subject, yet it may be applied here.

<sup>g</sup> L. 28, *D. comm. divid.* See the text cited on the following article.

express consent, he who has suffered it cannot oblige the other proprietor to restore the things to their first condition.<sup>h</sup>

## IX.

1496. *Change made without the Knowledge of one of the Parties concerned.* — If one of the proprietors makes some change, in the absence or without the knowledge of the others, which occasions them some loss, or which they have just cause not to approve of, he shall be obliged to restore things as they were,<sup>i</sup> in so far as is possible, and as equity shall require. And if he has caused any damage, he shall be bound to make it good.

## X.

1497. *He who has once consented to the Change cannot afterwards complain of it.* — He who, having seen the change, has consented to it, cannot afterwards complain of it, even although he should suffer from it some loss or damage.<sup>j</sup>

## XI.

1498. *Engagement to divide the Common Thing.* — It is always free for every one of those who have any thing in common among them to divide it; and although they may agree to put off the partition to a certain time, yet they can make no such agreement as never to come to a partition.<sup>m</sup> For it would be contrary to good manners, that the proprietors should be forced to have always an occasion of falling out, by reason of the undivided possession of a common thing.

## XII.

1499. *If the Common Thing cannot be divided.* — If the things which are to be shared cannot be divided into equal portions, the copartners may make their portions equal by returns of money, or otherwise. And if the common thing be indivisible, such as an office or a house which cannot be divided without great loss, or too great an inconvenience, it may be left to one of the proprietors alone for a price, which shall be divided among them all; in which case the thing is to be sold by cant or auction. And even strangers may be admitted to bid for it, if any one of the proprietors,

<sup>h</sup> L. 28, D. comm. divid.

<sup>i</sup> L. 28, D. comm. divid.

<sup>m</sup> L. ult. C. comm. divid.; — l. 29, in f. D. cod.; — l. 43, D. fam. ercisc.; — l. 14, § 1

<sup>j</sup> L. 28, D. comm. divid.

who either is not willing, or perhaps not able, to bid for it himself, desires that it may be so.<sup>a</sup>

## XIII.

1500. *A Charge laid upon one of the Lands that are divided.* — If, in a partition of several lands, or of one piece of land into two or more portions, it be necessary to subject one of the said portions, or one of the lands, to some service, for the use of the others, such as a passage, a draught of water, or other the like service; the arbitrators, or skilful persons, who shall be named to adjust the several shares or portions, may impose the service on the land which ought to be charged with it.<sup>o</sup> In which case, the condition of the copartners is to be made equal some other way, either by a return of money, or by giving a greater share of the land to the person who is burdened with the service, or by other ways.

## XIV.

1501. *Wrong done in the Partition.* — If there happens to be any considerable wrong done in the partition to any of the parties concerned, even although they be of age, whether it be by the means of some fraud in one of the copartners, or even although nothing can be laid to the charge of either, the said wrong shall be remedied by a new partition.<sup>p</sup>

## XV.

1502. *Warranty between the Copartners.* — After the partition of the things which were in common, each of the copartners is in the place of a seller to the other; and they ought reciprocally to warrant to one another their portions against evictions. Thus, for example, if the creditor to an inheritance, the effects of which have been divided among the coheirs, executes his mortgage against one of them after the partition of the estate; the other coheirs ought to warrant him against the said mortgage for their respective portions, even although no mention had been made of warranty in the partition.<sup>q</sup>

<sup>a</sup> L. 3, C. comm. divid.; — l. 1, C. cod.; — l. 55, D. fam. ercisc.

<sup>o</sup> L. 22, § 3, D. fam. ercisc.

<sup>p</sup> L. 3, C. comm. utr. jud. By the usage in France, the wrong done in a partition ought to be between a third and a fourth part in order to entitle the party aggrieved to a new partition.

<sup>q</sup> L. 3, C. comm. utr. jud.; — l. 14, C. fam. ercisc.; — l. 25, § 21, D. fam. ercisc.

## XVI.

1503. *The Deeds belonging to the Common Things, in whose Hands to be deposited.* — The deeds and writings appertaining to the common things, which are common to all the copartners, may be left in the custody of one of them, who takes charge of them, and gives his copartners collated copies of them, promising to produce the originals whenever it shall be necessary. Thus, among coheirs, the writings remain in the hands of the principal heir. But if there be no reason for preferring one of them to the rest, or if they cannot agree among themselves, they may cast lots who shall have the keeping of them, or the judge may determine the matter, or the writings may be deposited in the hands of a public notary, who may give every one of the parties concerned an authentic copy. But it is not usual to put it to cant or auction who shall have the keeping of the deeds.<sup>r</sup>

## XVII.

1504. *Of Things which it is not lawful to put into the Partition.* — If, among the common goods which are to be divided between two or more persons, there happen to be things of such a nature as that they cannot serve but to ill purposes; such as poisons, of which no good use can be made, books of magic, and other things of the like nature; they shall not enter into the partition, but the copartners, or the judge, if the matter comes to his knowledge, ought to dispose of them in such a manner as that no bad use may be made of them.<sup>s</sup>

## XVIII.

1505. *Things ill gotten.* — Things which have been acquired by evil ways, such as theft, robbery, sacrilege, do not likewise enter into the partition, but shall be restored to those to whom they belong.<sup>t</sup>

<sup>r</sup> L. 5, D. *fam. ercisc.*; — l. 4, § ult. *cod.*; — l. 5, C. *comm. utr. jud.*; — l. 6, D. *fam. ercisc.*; — v. l. ult. D. *de fide instr.*

<sup>s</sup> L. 4, § 1, D. *fam. ercisc.*

<sup>t</sup> L. 2, § 4, D. *fam. ercisc.*

## TITLE VI.

OF THOSE WHO HAVE LANDS OR TENEMENTS BORDERING UPON  
• ONE ANOTHER.

1506. THERE is another kind of engagement without covenant, which is formed between the proprietors of lands and tenements confining upon one another, by the bare effect of the situation of those lands and tenements, which obliges the proprietors to settle the boundaries of their several lands and tenements, if they are uncertain; or to keep to their respective possessions within the bounds already marked out, if any such there be.

## SECTION I.

HOW LANDS OR TENEMENTS BORDER AND CONFINE UPON ONE  
ANOTHER.

## ART. I.

1507. *Difference between Houses and Lands.* — The use of boundaries is chiefly for lands, where there is no building to regulate the extent of them; but houses and places inclosed with walls, whether in town or country, have their limits settled by ancient walls, whether they be partition-walls, belonging in common to the neighbours, or walls belonging peculiarly to one of them alone.\*

## II.

1508. *The Distance from the Confines, for Planting, Building, or making any other Work.* — Although the lands confining together be distinguished by the line which separates them, and is the boundary of them, which is marked out by landmarks; and the total of every one of the lands bordering upon one another belongs entirely, and as far as to the outmost extent of the confines, to him who is proprietor of it; yet he cannot however enjoy his land in such a manner as to be at liberty either to plant, build, or do what he has a mind to, close upon the confines, but, accord-

\* L. 4, § 10, *D. fin. regund.* See the following article.

ing to the nature of the plantation, building, or other work, he ought to keep the distance which is regulated by the custom and usage of the place.<sup>b</sup>

### III.

1509. *A Partition-Wall, and a Wall that belongs wholly to one.* — When a wall is just on the confines, it is a partition-wall; and being common to the two bordering lands or houses, it serves as a boundary to them.<sup>c</sup> But he who builds on his own proper ground has the wall to himself, provided he keeps the necessary distance from the wall that is common to both.<sup>d</sup>

### IV.

1510. *Lands separated by a Highway.* — Lands which are separated by a highway do not border upon one another; and the proprietors of those lands have no occasion to settle their limits; unless a change of the highway should happen to make it necessary.<sup>e</sup>

### V.

1511. *Lands with a Brook running through them.* — The rivulets which are not of public use, and which are the property of particular persons, whose lands they run across, do not regulate the limits of the said lands; but each proprietor has his own bounds, such as they are settled by his title or possession.<sup>f</sup>

### VI.

1512. *Several Views for regulating the Confines.* — If there be any uncertainty about the confines of lands or houses, whether in town or country, they are regulated by the titles, when there are any which describe either the place of the confines, or the extent which the said lands ought to have; by ancient landmarks; by ancient acknowledgments; or other the like proofs. And because

<sup>b</sup> *L. ult. D. fin. regund.* See the eighth article of the second section of *Services*. We have not put down in this article the several distances which are to be observed in planting, building, or making other works. For our usage is different from the law quoted on this article; and in this matter we observe the usage and customs of the places.

<sup>c</sup> *L. 4, § 10, D. fin. reg.*

<sup>d</sup> See the preceding article.

<sup>e</sup> *L. 4, in f. et l. 5, D. fin. regund.* See the sixth article of the first section of *Engagements which are formed by Accidents*.

<sup>f</sup> *L. 6, D. fin. regund.*

that after the date of the titles or deeds there may happen divers changes in the confines, they are also regulated by possession, and by the regard which ought to be had to those changes. As if a proprietor of two lands, which had their respective bounds, in the sale of one of them marks out other bounds to it than it had before ; or if other changes happen to be made by different purchases, or successions, which confound or distinguish the lands. And, in a word, we may regulate the confines by any other ways which may lead us to the knowledge of them.<sup>g</sup>

## VII.

1513. *Who may sue for a Regulation of the Confines.* — Tenants for a long term of years, usufructuaries, or mortgagees, may, as well as proprietors, bring their action to have the confines settled between them and the possessors of the neighbouring lands.<sup>h</sup>

## VIII.

1514. *The Question about the Confines is to be discussed after that relating to the Possession.* — If the same parties who are at law about the confines contest likewise the possession of the places whose confines are in debate, it will be necessary, in the first place, to determine the possession.<sup>i</sup> For the question relating to the confines concerns the property, which ought not to be decided till after the right of possession is determined.<sup>1</sup>

# SECTION II.

OF THE RECIPROCAL ENGAGEMENTS OF THE PROPRIETORS OR POSSESSORS OF LANDS AND TENEMENTS BORDERING UPON ONE ANOTHER.

## ART. I.

1515. *Distance from the Confines for Planting or Building.* — The proprietor, or other possessor of lands, in making a plantation, a building, or other work, ought to keep the distances between his work and the confines, according as they are regulated by custom

<sup>g</sup> L. 11, D. fin. regund. ; — l. 2, C. cod. ; — l. 12, D. fin. reg.

<sup>h</sup> L. 4, § 9, D. fin. regund.

<sup>i</sup> L. 3, C. fin. reg.

<sup>1</sup> See the seventeenth article of the first section of *Possession*.



and usage.<sup>a</sup> And if he transgresses therein, he will be obliged to demolish his building, pluck up his plantation, and restore things to the condition in which they ought to be, and to make good the damages which his undertaking shall have occasioned.<sup>b</sup>

## II.

1516. *Encroachment beyond the Confines.*—If the possessor of an estate encroaches upon his neighbour's ground beyond the confines, he will be liable for the damages occasioned by his undertaking,<sup>c</sup> and to make restitution of the fruits, or other profits, from the time of his usurpation. But he who shall have transgressed his bounds and enjoyed the fruits of his neighbour's ground innocently, thinking that it was his own, will be obliged to restore the fruits only from the time of the legal demand.<sup>d</sup>

## III.

1517. *If no Landmarks appear.*—If the confines of two estates become uncertain, whether by the deed of the proprietor or possessor of one of the estates, or by an accident; as if an inundation has carried away the landmarks, or some other accident has taken away the knowledge of the separation of the estates; it will be necessary to set new landmarks, by the advice of skilful persons, or according to the titles of the estates, or by the other ways which have been mentioned in the sixth article of the first section; and he who shall have encroached upon the other shall be bound to make restitution of the fruits, or other revenues, and of the damages, if there be occasion.<sup>e</sup>

## IV.

1518. *Of him who removes the Landmarks.*—If the landmarks have been removed by the act of one of the possessors, he shall not only be bound to make restitution of the fruits, and of the damages, but he may likewise be prosecuted for this trespass, and he shall be condemned to such punishment as the fact shall deserve, according to the circumstances.<sup>f</sup>

<sup>a</sup> See the second article of the first section.

<sup>b</sup> L. 4, § 2, *D. fin. regund.*; — d. 4, § 3.

<sup>c</sup> L. 4, § 1, *D. fin. regund.*

<sup>d</sup> L. 4, § 2, *D. fin. regund.*

<sup>e</sup> L. 8, *D. fin. regund.*; — d. 4, § 1.

<sup>f</sup> L. 2, et toto titulo *D. de térin. mot.*; — l. 4, § 4, *D. fin. regund.*; — v. l. 4, *C. cod.*

## V.

1519. *Power of those who are appointed to settle the Confines.* — The arbitrators, or skilful persons, appointed to settle the confines, may, according to the circumstances of the condition of the places, of the obscurity of the bounds, and of the conveniency of both proprietors, either divide what is in dispute, if the right of each party be uncertain; or adjudge it wholly to one of them, if there be ground for it; or bound the estates in another place, leaving on one side as much as is taken off on the other, or obliging him who happens to be the gainer by this change to make some return to his neighbour.<sup>s</sup>

## TITLE VII.

OF THOSE WHO RECEIVE WHAT IS NOT THEIR DUE, OR WHO HAPPEN TO HAVE IN THEIR POSSESSION THE THING OF ANOTHER, WITHOUT A COVENANT.

1520. *Different Ways of having the Thing of another without a Covenant.* — It may fall out by divers accidents, that one may chance to have in his possession the thing of another, and be obliged to restore it, although there have been no covenant between them to form this engagement. Thus, he to whom one pays, through mistake, a sum of money which was not due to him, is obliged to restore it. Thus, he who, believing himself to be the only heir, had taken possession of all the effects of an inheritance, is obliged to restore to the others who have right to the same inheritance that which comes to their share. Thus, he who finds a thing that has been lost ought to restore it to the owner. Thus, the possessor of a piece of ground, on which things have been cast that had been carried away by a flood, ought to restore them, or to let the owner come and take them away.

1521. We see by these examples, that it happens two ways that one may have the thing of another without a covenant. For one may have it either by a mere casualty, as in the last two

<sup>s</sup> L. 2, § 1; l. 3 et 4, D. fin. requir.

cases; or by a consequence of a voluntary act, as in the first two instances.

1522. *The Subject-Matter of this Title.*— In what manner soever it be that one has in his possession the thing belonging to another, whether through mere accident, or by a consequence of some voluntary act, the engagements are almost the same. But we have not thought it proper to mix and confound these two sorts of events together; and we treat only here of such events as make one person to have in his possession the thing of another, without covenant, by the consequence of some voluntary act, as it happens to him who receives what is not his due. For the other way of having the thing of another by a bare casualty is a part of the subject-matter of the ninth title, where we treat in general of the engagements which are formed by accidents; whether the accident puts into the possession of one person the thing of another, as in the two cases which have been just now mentioned; or that without that there be formed another sort of engagement, as happens to him whose goods have been saved in a danger of shipwreck, by the loss of other goods which have been thrown overboard to save the ship; for he whose goods have been saved ought to bear his share of the loss; and this engagement is formed although one has not the thing of another. So that the reader will have in the ninth title, and in this, all the rules which concern the different ways in which one person may have in his possession the thing of another; and the ninth title will contain, moreover, the other sorts of engagements which are formed by accidents.

1523. Seeing there is an infinite number of cases in which it may happen that, by the consequence of some voluntary act, whether lawful or unlawful, one may chance to have in his possession the thing of another without covenant, it is sufficient to see in some cases the rules belonging to this matter, which it will be easy to apply to all the cases that may fall out.

## SECTION I.

SOME EXAMPLES OF THE CASES WHICH ARE THE SUBJECT-MATTER OF THIS TITLE, AND WHICH HAVE NOTHING IN THEM THAT IS UNLAWFUL.

## ART. I.

1524. *He who receives what is not due to him is obliged to restore it.* — He who receives payment of what is not due to him, even although he were truly persuaded that it were due to him, and he who pays it were of the same mind likewise, acquires no manner of right to what is paid him in this manner; but he ought to restore it. Thus, he who has received a legacy by virtue of a testament which appears afterwards to be forged, or of no validity, ought to restore what he has received on that account. And it would be the same thing, although the testament were not forged or invalid, if the legacy happened to be revoked by a codicil, which did not appear till after the payment.\*

## II.

1525. *Of Payment made by him who thought himself to be a Debtor and was not.* — If a creditor receives payment from the hands of one who, thinking himself to be his debtor, was not really indebted to him, and paid only in the belief that he acquitted his own debt, this payment does not acquit the true debtor, and obliges him who receives it to make restitution of what is paid him barely through this mistake. Thus, for example, if a presumptive heir, being informed of the death of his relation to whom he had a right to succeed, and knowing nothing of a testament which cuts him off from the whole inheritance, pays off a debt owing by the deceased before he intermeddles with the goods of the succession, thinking thereby to discharge himself as being heir, and laying out his own money to that end, the creditor who shall have received that money shall be bound to restore it, and shall retain his right or demand, upon the estate of the deceased.<sup>b</sup> But

\* L. 2, § 1, *D. de cond. inst.*; — § 6, *Inst. d. obl. que quas. ex contr.*

<sup>b</sup> L. 65, § ult. *D. de condict. indeb.*; — l. 19, § 1, *D. de cond. indeb.* See the seventh article of the first section of the *Vices of Covehants*. This rule is to be understood of the case where he who believed himself to be heir or executor, and who was not, had paid out

if the said creditor had destroyed the title which was the evidence of his debt, as if it was a bond which he had torn in pieces, so that his debt would be either lost, or in danger of being so, the payment in this case would subsist; and he who paid the money would have himself to blame for it, and he would have his action against the heir or executor, for recovering what he had paid for his behoof.

### III.

1526. *Of Payment made by a Third Person for the Debtor.* — If a third person pays to a creditor what he knows to be owing to him by another, the said creditor will not be obliged to restore it, for he has received only what was his due; and this third person may have been willing to acquit the true debtor.<sup>c</sup>

### IV.

1527. *The Creditor does not give back what has been paid him before the Term.* — If a debtor pays before the term, even although the thing were not to be due till after his death, the creditor who receives the said payment, although he had no right to demand it, may nevertheless retain it. For the debtor might, if he thought fit, pay before it was due, and he has paid only what he owed.<sup>d</sup> But if it was a conditional debt, which depended on the event of something which had not as yet happened, and which might perhaps never happen, he who had received payment of it through some mistake could not retain it; for he was not as yet a creditor. But if the condition were such that it must necessarily happen, there would be no recovery of such payment.<sup>e</sup>

### V.

1528. *If one by Mistake, or willingly, pays what is not due.* — He who pays through mistake what he thought he owed, and what he did not really owe, may recover it, whether it be that the thing was never in effect due, or that, the thing having been due, some event had happened which annulled the debt, and which was un-

of his own pocket before he intermeddled with the goods of the succession, and where all things relating to the succession were yet entire. We must not confound the case of this rule with that of the following rule.

<sup>c</sup> L. 44, D. de cond. indeb.

<sup>d</sup> L. 10, D. de cond. indeb.; — l. 17, eod. See the fifth article of the first section of Payments.

<sup>e</sup> L. 16, D. de cond. indeb.; — l. 18, eod.

known to the debtor. As, for example, if a debtor having paid his debt to the heir of his creditor, there appeared afterwards a testament by which the creditor had forgiven the debt. But he who, knowing he has means whereby to defend himself against his creditor, does nevertheless pay willingly, cannot demand what he has paid. For it was in his power to renounce the reasons or defences which he may have had to avoid paying the debt.<sup>f</sup>

## VI.

1529. *Payment made in a Doubtful Case.* — He who, being in a doubt whether he owes or not, pays at all adventures to free himself in case it should appear that he were really indebted, may recover what he shall have paid, if it be found in reality that he owed nothing; unless it shall appear that in the doubt the parties had a mind to put an end to their dispute by the said payment, and that it was in lieu of a transaction. For in this case the payment subsists.<sup>g</sup>

## VII.

1530. *Of him who owes One of Two Things.* — If he who owed one of two things has given them both, either by mistake or out of ignorance, he who has received them shall not have the liberty to choose which of the two he has a mind to keep; but the debtor shall retain the right of choosing and of leaving with the creditor the thing which he pleases to give him, and of taking back the other.<sup>h</sup>

## VIII.

1531. *Example of another Kind.* — He who happens to be in possession of a thing belonging to another, whether it be movable or immovable, by what title soever he possesses it, whether by sale, donation, or other title, is obliged to restore it to the owner, whenever he appears, and makes out his right. Thus, the purchaser of a piece of ground, which is recovered from him at law by the right owner, is obliged to restore it to him; and this engagement is of the number of those that are formed without a covenant.<sup>i</sup>

<sup>f</sup> L. 1, § 1, *D. de cond. indeb.*; — l. 26, § 3, *D. eod.*

<sup>g</sup> L. ult. *C. de cond. indebit.*

<sup>h</sup> L. pen. *C. de cond. indebit.*

<sup>i</sup> See the tenth section of the *Contract of Sale*.

## IX.

1532. *Another Example.*—The heir who, during the absence of his coheir, or believing himself to be sole heir, takes possession of all the goods, obliges himself without a covenant to restore to the other his share of the inheritance, whenever he shall appear.\*

## X.

1533. *Restitution of a Thing which one has without a just Title.*—He who happens to have the thing of another without a just cause, or to whom a thing was given for a cause which ceases, or upon a condition which does not happen, having no longer any cause for keeping it, ought to restore it. Thus, he who had received a dowry for a marriage which does not take effect, or which is annulled, ought to restore that which was given only upon that account.<sup>1</sup> Thus, with much greater reason, are they who have received money, or any other thing, for an unjust cause, bound to restore it.

## XI.

1534. *Payment of a Debt which it was in the Debtor's Power not to have paid.*—The debtors who acquit voluntarily debts which they might have procured to be declared null in strictness of law, although natural equity made them just debts, cannot afterwards deny the debt which they have once approved of.<sup>m</sup> Thus, for example, if a married woman who had entered into bond without the approbation or consent of her husband, or even with his consent, in the customs where a wife cannot be bound, acquits in her widowhood her obligation, which would have been declared null and void in law, she cannot afterwards call in question the payment which she had made of the said debt. Thus, a minor being arrived at the years of majority, and paying them a debt against which he might have been relieved, cannot demand back what he has paid. For in these cases there was a natural obligation which the debtor had power to acquit.

\* See the ninth article of the third section of *Interest, Costs and Damages, &c.*

<sup>1</sup> L. 1, § ult. *D. de cond. sine causa*; — l. 4, *cod.*; — l. 7, § ult. *D. de cond. caus. dnt. s. v. l. 8, cod.*; — l. 1, § 1, *D. de cond. ob turp. vel injust. caus.* One may receive something for an unjust cause, without a covenant, as by concussion or other violence. And one may likewise receive something by an unlawful covenant; concerning which the reader may consult the last article of the fourth section of the *Vices of Covenants*, and the section which immediately follows this.

<sup>m</sup> L. 10, *D. de ol. et act.* See the fourth article of the first section of *Payments.*

## SECTION II.

## OTHER EXAMPLES OF THE SAME MATTER, IN CASES OF UNLAWFUL ACTS.

1535. By unlawful acts we understand here, not only those which are prohibited by some express law, but all those which are contrary to equity, honesty, or good manners, although there be no written law which makes mention of them. For whatever is contrary to equity, honesty, or good manners is contrary to the principles both of divine and human laws.

## ART. I.

1536. *Three Sorts of Unlawful Acts.*—It may happen three ways, that by an unlawful act one may receive a sum of money or other thing from another person. For the act may be unlawful either only on the part of him who gives, or only on the part of him who receives, or on the part both of the giver and receiver.\* Thus, he who under pretext of civility should make a present to one who he knew would be his judge or arbitrator, and who on his part was altogether ignorant of the motive of the said present, would give unlawfully what the said person might receive without any offence to justice. Thus, when any person, either by himself or others, exacts a sum of money, or other things, to hinder him from committing some greater violence, or makes one deliver up to him the titles of some debt or some right which he owes, the said act is only unlawful on the part of the person who commits the violence, and not on the part of him who suffers it. Thus, when a person receives money of another; either himself or by a third hand, to commit some crime, some offence, or some injustice, the act is unlawful, both on the part of him who receives and of him who gives.

## II.

1537. *An Act Unlawful only on the Part of him who gives.*—If the act be unlawful only on the part of him who gives, he who has received will not be obliged to give it back, unless it be that the circumstances regulate his duty in another manner. Thus, in the

\* L. 1, D. de conduct. ob turp. vel inj. caus.



case of him who had received a present, being ignorant of the unjust motive of giving it, as has been explained in the first article, if the said motive chanced afterwards to come to his knowledge, he would be obliged either to abstain from the function of judge or arbitrator, or to give back the present which he had received, or even to do both the one and the other, according as prudence and equity might require under the circumstances of the quality of the persons and of that of the act.<sup>b</sup>

### III.

1538. *An Act that is Unlawful only on the Part of the Receiver.*—When the act is unlawful only on the part of him who has received a thing for an unjust cause, he who has given it may recover it again, although the receiver have performed what he was bound to by his engagement.<sup>c</sup> And nothing can excuse the receiver from making restitution, even although the thing were not demanded of him, nor from the other punishments which the fact may deserve, if it comes before a court of justice.

### IV.

1539. *An Act Unlawful both on the Part of the Giver and of the Receiver.*—If the act be unlawful both on the part of him who gives and on the part of him who receives, the giver shall lose deservedly what he has employed to so ill a purpose, and shall have no action for recovering it.<sup>d</sup> And the receiver cannot retain this unjust profit: and even although he had executed the unlawful engagement for which he had received the money or other thing, he shall be obliged to make restitution to the person to whom it may be due; and, moreover, be liable to the other punishments which he may have deserved.

<sup>b</sup> This is a sequel of the first case explained in the foregoing article. . L. 1, *D. de cond. ob turp. vel injust. caus.*

<sup>c</sup> L. 1, § 2, *D. de cond. ob turp. vel inj. caus.*; — l. 6, *D. eod.*

<sup>d</sup> L. 3, *D. de cond. ob turp. vel injust. caus.* See the third, fourth, and fifth articles of the fourth section of the *Vices of Covenants*, and the remark on the said fifth article.

## SECTION III.

OF THE ENGAGEMENTS OF HIM WHO HATH SOMETHING BELONGING  
TO ANOTHER PERSON WITHOUT A COVENANT.

### ART. I.

1540. *Restitution of Money, with Interest, if there be Ground for it.* — The engagement of him who happens to have a sum of money belonging to another person, whether it be that he had received it in payment of a debt that was not due, or that he had come by it some other way, consists in restoring the said money without interest,<sup>a</sup> except from the time of the demand, provided he has acted honestly and fairly. But if there was on his part any knavish dealing, he shall be obliged to pay the interest of the money from the time that he began to act knavishly.

### II.

1541. *Care of the Thing.* — If it be any other thing besides money that is to be restored, he who begins to know of his engagement to make restitution ought to take care of the thing, and to preserve it till he restore it. But if the thing happens to be damaged, or even perishes, whilst the possessor was verily persuaded that it was his own, and before it had been demanded of him, and he was without blame for not restoring it, he would not be accountable for it, even although the thing had perished through his negligence. For his condition ought to be the same as if he had been the owner of the thing. But after the demand, if he was in delay, he would be answerable for every<sup>b</sup> thing that should happen, even without any fault of his.

### III.

1542. *Restitution of the Fruits.* — If it is land or houses which is to be restored, or any other thing which produces some revenue, the possessor who is bound to restore the thing is bound also to restore with it the fruits or revenues which he has reaped, either only from the time of the demand, or even for the whole time of

<sup>a</sup> L. 1, C. de cond. ind.

<sup>b</sup> L. 13, D. de rei vind.; — l. 15, § ult. cod. — l. 45, cod.

his enjoyment of it, according to the nature of the cause which had transferred the thing into his hands, and the circumstances.

#### IV.

1543. *Of the Augmentation happened to the Thing which is to be restored.*—If the thing which is to be restored chanced to be augmented while it was in the possession of him who is bound to restore it; as if a herd of cattle was increased in number, or a piece of land adjoining to a river became greater; the whole must be restored.<sup>4</sup>

#### V.

1544. *If he who had a Thing belonging to another has alienated it.*—If he who had a thing belonging to another, believing in good earnest that he himself was the true owner of it, had under this honest, sincere persuasion alienated the thing, he would be bound only to restore what profit he had made by it, such as the

\* L. 13, *D. de cond. indeb.*; — l. 38, § 2, *D. de usur.*; — l. 65, § 5, *D. de cond. ob.* There are many cases in which the honesty and fair dealing of the possessor do not discharge him from the restitution of the fruits. See the ninth, tenth, and fourteenth articles of the third section of *Interest, Costs and Damages*, &c. *Vid. l. 7, § ult. D. et l. 12, D. de cond. caus. dat.*

The laws cited upon this article have not relation to all the cases explained in the first section, but only to the case of him who has received a thing that was not due to him: and if it produces any fruits or other revenues, these laws oblige the possessor without any distinction, although he have enjoyed the thing honestly and fairly, to restore the fruits, although he who had received money that was not due to him is not bound to pay the interest of it, as has been said in the first article of this section. But we thought that this rule, which may be just in certain cases, might in other cases prove a hardship which would be unjust, even when it is restrained to that which shall have been given, not being due. Thus, for example, if an executor delivers to a poor legatee a piece of ground which had been left him by a codicil, and after the said legatee had enjoyed it for many years, the codicil appears to have been forged, but without the legatee's having had any hand in the forgery, but he having enjoyed the land honestly and fairly, and having consumed the fruits of it in the maintenance of his family; and supposing the said legatee could not restore the fruits without being ruined or very much incommoded thereby; would it be unjust to discharge him from this restitution, which a legatee who is rich and at his ease might be bound to for this reason, that he ought not to profit by the enjoyment of a thing to which he had no right, and of which the true owner had been deprived by a false title? It is upon the view of these several events, and of the other different causes which may oblige one to make restitution of the fruits, or discharge him from it, that we have thought that the use of the rule ought to be left to the prudence of the judge, according to the cause which gave occasion to the possessor's enjoyment of the thing, and the circumstances.

\* L. 13, *D. de cond. indeb.*

price which he got for it, if the thing was sold, although he had not sold it for the full value.\*

## SECTION IV.

### OF THE ENGAGEMENTS OF THE MASTER OF THE THING.

1545. *The Master ought to refund what has been laid out in the Preservation of the Thing.*—He whose thing hath been in the possession of another, and who recovers it, even although it were from one who had detained it knowing himself not to be the true owner of it, is obliged to refund the possessor of all that he has usefully laid out in preserving the thing; and if there be fruits to be restored, out of them must be deducted the expenses which the possessor has been at in gathering them.\*

## TITLE VIII.

### OF DAMAGES OCCASIONED BY FAULTS WHICH DO NOT AMOUNT TO A CRIME OR OFFENCE.

1546. *The Subject-Matter of this Title.*—We may distinguish three sorts of faults from which some damage may proceed. Those which amount to a crime or offence: those of the persons who fail in the performance of the engagements which they are bound to by covenant; such as a seller who does not deliver the thing sold; a tenant who does not make the repairs which he is bound to by his lease: and those which have no relation to covenants, and which do not amount to a crime or an offence; as if out of wantonness one throws out any thing at the window which spoils a suit of clothes; if beasts, for want of being carefully watched, do any damage; if a house is set on fire through imprudence; if a building that is gone to decay, for want of being repaired, falls upon another, and damages it. Of these three sorts

\* L. 26, § 12, *D. de conflict. ind.*

\* L. 65, § 5, *D. de condict. indebit.*;—l. 46, *D. de usur.* See the eleventh article of the third section of *Interest, Costs and Damages, &c.*, and the remark on the said article

of faults, it is only these of the last kind which are the subject-matter of this title. For crimes and offences ought not to be blended with civil matters; and all that relates to covenants has been explained in the first book.

The reader may, with respect to the matter of this title, consult that of *Interest, Costs and Damages, &c.*

## SECTION I.

OF THAT WHICH IS THROWN OUT OF A HOUSE, OR WHICH MAY FALL DOWN FROM IT, AND DO SOME DAMAGE.

### ART. I.

1547. *He who inhabits the House is liable for the Damage.*—He who inhabits a house, whether he be the proprietor of it, tenant, or other, is liable for the damage which is caused by any thing thrown out or poured out of any place of the said house, whether by day or by night. And he ought to answer for it to him who shall have suffered the damage, whether it was he himself that threw it out, or any of his family or domestics, even although it were in his absence, or without his knowledge.<sup>a</sup>

### II.

1548. *The Prohibitions of throwing any Thing out of Houses regard the Security of all Sorts of Places.*—Seeing the prohibitions of throwing or pouring any thing out of houses have regard to the security of the places where the damage may happen, they are not therefore limited to the streets, to squares, and other public places; but they extend to all the places where this imprudence may be attended with any damage.<sup>b</sup>

### III.

1549. *The Master of the House liable to a Fine on this Account.*—Besides the making good the damage which shall have been caused by what has been thrown or poured out, he who dwells in the house will be condemned to the penalty which the civil policy

<sup>a</sup> L. 1, *D. de his qui effud. vel dejec.* ; — l. 6, § 2, *cod.* ; — l. 6, § 1, *cod.* See the following articles.

<sup>b</sup> L. 1, §§ 1 et 2, *D. de his qui effud. vel dejec.*

may have established,\* or to such other penalty as the judge shall think fit to inflict, according to the circumstances.<sup>4</sup>

#### IV.

1550. *If any one is killed or hurt.*—If that which has been thrown out causes the death of any person, or wounds him, the person who did it will be tried for it in a criminal prosecution. And he shall be punished according to the nature of the act, and will be liable to make good the damage that is done. And the master of the house will likewise be liable to a fine, and to such damages or other penalty as he may appear to deserve, according to the circumstances.\*

#### V.

1551. *If several Persons inhabit the same Place.*—If several persons inhabit the same place from whence any thing hath been thrown or poured out, every one of them will be answerable for the whole damage; unless it can be known which of the masters, or of the persons for whom each master is answerable, has caused it. But if their habitation be distinct, every one is only answerable for what shall be thrown out of the places which he occupies.<sup>4</sup>

#### VI.

1552. *If one has the whole House, and lets out Chambers.*—Although the proprietor or principal tenant of a house occupies only a small part of it, if he lets chambers, or lodges one of his friends in some of them, he shall be answerable for the act of the person whom he receives into his house. But if it appear out of what room the thing has been thrown, the action may be brought either against the person who lodges in the said room, or against him who has the whole house.<sup>5</sup> And this last will have his recourse against the other.

\* L. 1, D. de his qui effud. vel dejec.

\* The penalties are arbitrary in France.

\* L. 2, D. de his qui effud. vel dejec.

† L. 1, § ult., ll. 2 et 3, D. de his qui effud. vel dejec.; — l. 5, cod. See the following article.

‡ L. 5, §§ 1 et 2, D. de his qui effud. vel dejec. See the foregoing article. The civil policy of towns takes notice only of those who occupy the houses, because they consider them as inhabitants who are answerable to the public for the persons whom they receive into their houses, as to what concerns the matter of policy which is here treated of

## VII.

1553. *Of those who take into their Houses Scholars or other Persons.* — Schoolmasters, tradesmen, and others, who take into their houses scholars, apprentices, or other persons, to instruct them in some art, manufacture, or trade, are answerable for the act of those persons.<sup>b</sup>

## VIII.

1554. *If any Thing has been thrown out with Design to do Hurt.* — All the foregoing articles are to be understood of that which has been thrown down or poured out through carelessness, and without any design. But if it has been done with design, the injury, the offence, or crime, will be chastised with severer punishments, according to the nature of the act and the circumstances.<sup>1</sup>

## IX.

1555. *Prohibition to have any Thing hung out, which may fall and do Mischief.* — If there be any thing hung out from the roof of a house, from a window, or any other place from whence the fall of it may do some harm or damage, he who inhabits the house or place from whence it is hung out will be condemned in such fine as shall have been regulated by the policy of the town, or such as shall be inflicted by the judge, according to the circumstances; even although the thing did not fall, and although it had been put there by another than the master of the house. For it is for the public interest that people should walk securely and without danger from accidents of this kind.<sup>1</sup>

## X.

1556. *If the Fall of the Thing that is hung out does any Harm.* — If the thing that is hung out happens to fall and causes any mischief, he who inhabits the house will be bound to make good the damage, over and above the penalty which he would be liable to although no accident had happened from the hanging out of the thing.<sup>2</sup>

<sup>b</sup> L. 5, § 3, D. de his qui effud. vel dejec.

<sup>1</sup> L. 1, D. de injur.

<sup>2</sup> L. 5, § 6, D. de his qui effud. vel dejec.; — d. l. 5, §§ 7, 8, 10, 11.

<sup>3</sup> L. 5, § 11, D. de his qui effud. vel dejec.

## XI.

1557. *Tiles falling from the Roof of a House.* — If tiles fall from the roof of a house which was in good case, and by the bare effect of a storm, the damage which may happen by such fall is an accident for which the proprietor or tenant of the house cannot be made accountable. But if the roof was in a bad condition, he who was bound to keep it in repair may be liable to make good the damage that has happened, according to the circumstances.\*

## SECTION II.

## OF DAMAGES DONE BY LIVING CREATURES.

1558. THE order which links mankind in society together obliges them, not only to do no manner of harm themselves to any mortal whatsoever, but likewise obliges every one to keep what is in his possession in such a condition that nobody may receive from it any hurt or damage; which implies the duty of keeping up living creatures that any one has in his possession, so as that they may not be able to hurt the persons of men, nor to cause them any loss or damage in their goods.

1559. The most frequent damage which is caused by living creatures is that which cattle do in the country, by feeding in places where, or at times when, the owners of them have no right of pasturage. Seeing what concerns these sorts of damages is otherwise regulated by the customs of many places than it was by the Roman law, we shall put down here only some general rules which may be of common use, and not what is contained in the Roman law contrary to the customs, nor yet what is particular in the customs relating to this matter. Thus, for example, it was not permitted by the Roman law to impound cattle which had done any damage;† but this some customs do allow of, as also of keeping them some time for a proof of the damage; and they likewise inflict a fine on the owners or possessors of such cattle, although the damage have been done only by cattle that have strayed or made their escape from their keeper.

\* L. 24, § 4, l. 43, *D. de dam. inf.* Although the laws cited upon this article relate to the case of a neighbour who had taken proper care to prevent the danger, yet would it not be just that a proprietor or tenant of a house should be punished for a negligence which had been followed by such an accident? See *Deul. xxii. 8.*

† L. 39, § 1, *D. ad legem Aquil.*



## ART. I.

1560. *The Master of the Cattle is answerable for the Damage which they do.*—If any cattle that are kept, or that have escaped out of custody, have depastured in a place where the master of the cattle had not the right of pasturage, or at a time when the pasturage was not permitted, he shall be accountable for the damage which his cattle shall have caused.<sup>a</sup>

## II.

1561. *He is also liable to a Fine.*—If any one depastures his cattle in a ground which is not liable to pasturage, or at a time when the pasturage ought to cease, the master or other possessor of the cattle will not only be liable to make good the damage, but likewise condemned in a fine such as the act may deserve, according to the circumstances.<sup>b</sup>

## III.

1562. *Other Damage besides that of grazing in another Man's Ground.*—If cattle that are kept or not kept do any other damage besides that of feeding in another man's ground, as if they break or damage trees, the master or other possessor will be obliged to make good the damage, and will likewise be fined, if there be ground for it.<sup>c</sup>

## IV.

1563. *The Cattle ought to be driven out of another Man's Ground without hurting them.*—He who shall have taken the cattle of another person feeding in his ground, or doing any other damage, cannot use any violence that may hurt the cattle, nor drive them out in any other manner than he would do his own. And if he causes any damage to the said cattle, he shall be bound to make it good.<sup>d</sup>

## V.

1564. *Of him who cannot keep in his Horse or other Beast.*—As to all other damage which may be done by beasts, he who is the

<sup>a</sup> L. 1, D. si quadr. paup. fec. dic.;—l. ult. C. de lege Aquil.;—l. 39, § 1, D. ad leg. Aquil.;—v. Exod. xxii. 5.

<sup>b</sup> L. 1, C. de fungl. et salt. rei dom.;—l. 2, C. de pasc. publ. et privat.;—l. ult. eod.

<sup>c</sup> L. 39, § 1, D. ad leg. Aquil.

<sup>d</sup> L. 39, D. ad legem Aquil. By the customs of some places, it is allowed to impound the cattle that do any damage, as has been observed in the preamble.

owner or who has charge of them will be answerable for it, if he could or ought to have prevented the evil. Thus, a mule-driver, a wagoner, or other carrier, who hath not strength or skill enough to hold in a mettlesome horse or an unruly mule, will be liable for the damage which they shall cause; for he ought not to have undertaken what he had not skill or strength enough to perform. Thus, he who by overloading a horse or other beast, or by not avoiding a dangerous step, or by some other fault, occasions a fall which causes damage to some passenger, will be made accountable for the said act. And in all these cases, he who suffers the damage shall have his action against the carrier, or against the person who employed him.\*

## VI.

1565. *Of an Ox that pushes with his Horns.*—If an ox has a trick of pushing with his horns, and wounds any one or causes any other damage, the master who has neglected to shut up this ox, or to give such warning that people might avoid him, shall be answerable for the harm he shall do.<sup>f</sup>

## VII.

1566. *Of Horses who bite or kick.*—Those who have horses or mules which kick or bite ought either to warn people of their being vicious, or to take care to have them well watched, to prevent all occasions of danger; otherwise they will be made liable for the damage which they shall happen to do.<sup>g</sup>

## VIII.

1567. *Of Dogs who bite.*—If a dog who has a trick of biting is not kept up, or if he gets loose for want of being well looked after, and wounds any one, the master of the dog will be liable to make good the damage. And that with much more reason, if it

\* L. 8, § 1, *D. ad leg. Aquil.*; — l. 1, § 4, *D. si quadr. paup. fec. dic.*

<sup>f</sup> L. 52, § 3, *D. ad leg. Aquil.*; — *l. v. Erud.* xxi. 29, 36.

<sup>g</sup> L. 1, § 4, *D. si quadrup. paup. fec. dic.*; — l. ult. *cod.*; — l. 1, § 7, *cod.*

We must take care, in applying this last text, not to impute too easily to the master of a horse, or of any other beast, the accidents which may have been occasioned by the imprudence of those to whom they happen. Thus, for example, if one who is ignorant whether a horse kicks or not, goes too near him without necessity, and lays his hand on his crupper, standing within reach of a kick, it is an act of imprudence, because one ought to mistrust; and such an imprudence may occasion the horse's striking, where no blame could be imputed to the master of the horse.

was a dog who ought to be chained up, and who was not put out of a condition of hurting those who might come near him through inadvertency.<sup>b</sup>

## IX.

1568. *Of Wild Beasts.*—Those who have wild beasts, such as lions, tigers, bears, and others of the like kind, ought to keep them in such a manner that it be not in their power to do any harm; and they shall answer for all the damage that is occasioned by their not being strictly kept up.<sup>c</sup>

## X.

1569. *If a Beast does hurt, being provoked.*—If a dog or other creature bites, or does any other damage, only because he has been provoked or egged on, he who shall have given occasion to the evil that has happened shall be accountable for it; and if it be the same person who has suffered the evil, he ought to blame himself for it.<sup>d</sup>

## XI.

1570. *If the Beast hath been stirred up by another Beast.*—If the beast which has done the damage hath been exasperated and stirred up by another beast, the master of this beast which stirred up the other to do the damage shall be accountable for it.<sup>e</sup>

## XII.

1571. *If one Beast kills another belonging to another Master.*—If two rams or two oxen, belonging to two different masters, happen to run at one another, and one of them kills the other, the master of the ox or ram which was the first aggressor will be

<sup>b</sup> L. 1, § 5, *D. si quadr. paup. fec. dic.*; — l. 2, § 1, *cod.*

<sup>c</sup> This is a consequence of the foregoing article. L. 1, § 10, *D. si quadr. paup. fec. dic.* To justify the impunity of the master of this bear, we must suppose that it was without the master's fault that the bear got loose, as if any one had maliciously set him at liberty, when the master could not be blamed for it. For if the bear gets loose through the master's fault, it is both equitable and also for the public good that he be made answerable for a fault of such consequence. And seeing he profits by the use which he can make of this beast, seeing he is the master of it, and may even claim it as his property, having purchased it either with his money or by his industry, and having spent his time and labor to draw some profit from it, he ought to answer for it.

<sup>d</sup> L. 11, § 5, *D. ad leg. Aquil.*; — l. 1, § 6, *D. si quadr. paup. fec. dic.*; — v. d. l. § 7.

<sup>e</sup> L. 1, § 8, *D. si quadr. paup. fec. dic.*; — v. d. l. § 7.

obliged either to abandon the beast which has done the damage, or to make good the other's loss.<sup>a</sup>

### SECTION III.

OF THE DAMAGE WHICH MAY HAPPEN BY THE FALL OF A BUILDING, OR OF ANY NEW WORK.

1572. SEEING in this matter our usage is different from the disposition of the Roman law, and that we do not observe the rule which directed him whose building was in danger of being damaged by the fall of another building gone to decay to be put into possession of the ruinous building, if the owner thereof did not give him surety for the damage that was to be apprehended from it,<sup>a</sup> we have endeavoured to turn and accommodate to our usage the rules of the Roman law, according as they may be applied

#### ART. I.

1573. *The Owner of the Ruinous Building may be summoned to demolish or repair it.*—If a building is in danger of falling, the proprietor of the adjoining house or tenement, seeing his own building in hazard of being damaged by the fall of the other, may summon the owner of the ruinous building, either to pull it down, or to repair it, so as that there may be no more danger from it.<sup>a</sup> And seeing it is an evil to come, which may happen every moment, and which it is necessary to prevent, if he does not give speedy satisfaction, the magistrate will give order about it, according to the rules which follow.

#### II.

1574. *Permission from the Judge to provide against the Danger.*—If the proprietor of the building, whose fall may do hurt to his neighbour, after having been legally summoned to prevent the evil, neglects to take care of it, he whose tenement is in danger from the fall of the other may demand provisionally, that he himself may be permitted to do whatever skilful persons shall judge

<sup>a</sup> L. 1, § 11, D. si quadr. paup. fec. dic.

<sup>a</sup> L. 4, § 1, D. de damn. inf.

<sup>a</sup> L. 2, D. de damn. inf.;—l. 7, § 1, cod.;—l. 1, cod.

necessary to prevent the fall of the said building, whether by propping it up, or demolishing it, if there be occasion; and he shall recover from the proprietor of the decayed building the expenses which he shall have laid out on this account.<sup>b</sup>

### III.

*1575. He will recover Damages against the Negligent Proprietor.* — If, during the delay of the proprietor who is condemned or summoned to demolish or prop up his building, it chances to fall, he will be liable to damages, according to the circumstances.\*

### IV.

*1576. If the Building falls before the Proprietor has been warned to repair it.* — If the building falls before any warning has been given to the proprietor, he will not be obliged to make good the damage, if he is willing to abandon both the ground and materials of the building; in which case he will not be obliged so much as to carry off the rubbish. For he who has suffered the damage ought to blame himself for not having timely enough provided against the danger which he might have easily foreseen. But if the proprietor will have back the materials of his building, or keep the ground on which it stood, he shall be bound to make

<sup>b</sup> *L. 7, D. de damn. inf.*; — *l. 28, cod.*; — *l. 15, § 34, cod.*

\* *L. 7, D. de damn. inf.*; — *ll. 28, 29, cod.* If because of the danger from the fall of a ruinous building, or of the damage which its fall may have caused to an adjoining house, the proprietor or tenants of the said house have been forced to quit their dwelling; and the said house has either been thrown down by the fall of the other, or so damaged that it is not in a condition of being inhabited; will the proprietor of the building which caused the damage be liable to pay the damages occasioned by the fall or to repair the mischief that is done in the neighbouring house, or will he likewise be obliged to make good to the landlord the loss of his rent? And must all these reparations of damages take place in all sorts of cases without distinction of the different circumstances that may chance to be in the different cases? And if it should happen, for example, that the owner of the ruinous house were at a great distance, and had been long absent, or that, not having wherewithal to repair or prop up his house, he had made answer to the summons, that, he himself not being able to do what was desired of him, he therefore entreated the neighbour, who was a person of wealth and substance, to prop up the building himself, or to make the necessary repairs, offering him for the security of the expenses he should be at the mortgage of the house, and this neighbour refusing to do any thing therein, the house fell; would it not be equitable under these circumstances to mitigate the damage, or even to acquit the said proprietor from paying any damages at all? But if we suppose a proprietor rich and negligent, who, being summoned to prop up his building, has suffered it to fall upon the house of a poor neighbour, ought not this negligence to be punished by an entire satisfaction, both for the loss of the house and also of the rent?

good all the damage caused by the fall of his building, although no warning had been given him to repair it before it fell. And he will also be obliged in this case to remove from his neighbour's ground, not only the materials of the building which may serve again, but likewise all the rubbish which will be of no use.<sup>d</sup>

## V.

1577. *Of the Superfluous Ornaments of a Building that is thrown down by the Fall of another.* — If, by the falling of a building which had thrown down another, there be ground for recovering damages, and if there was painting, carving, or other ornaments serving barely for pleasure, in the place which was thrown down by the fall of the other building; the things of this kind, being of superfluous use, would not be estimated at their full value. But the said estimation would be made with moderation, and with a temperament of justice and humanity, according as the quality of the fact which may have given occasion to the damage, that of the persons, and the other circumstances, might require.<sup>e</sup>

## VI.

1578. *When a House is thrown down by an Accident, after the Owner has been warned to repair it.* — If a house which was going to decay, and for preventing the fall of which the neighbour had given warning to its owner, is afterwards thrown down by an accident, such as a flood, or a violent storm of wind, and the fall of it throws down the adjoining house, the proprietor of the house whose fall throws down the other will not be accountable for this accident; unless it be that the flood or storm has thrown down the house only because of the bad condition it was in.<sup>f</sup>

<sup>d</sup> L. 10, § 1, *D. de neg. gest.*; — l. 6, *D. de damn. inf.*; — l. 7, §§ 1 et 2, *D. eod.* See the fourth and fifth articles of the second section of the title of *Engagements formed by Accidents*.

<sup>e</sup> L. 40, *D. de damn. inf.* We must observe here the difference between this case and that of the fourth article of the fourth section of *Services*, where he who throws down a partition-wall to make it sufficient for the use of the service owes nothing for the value of the paintings which his neighbour had on the said wall. For in the case of that fourth article, each proprietor had a right to pull down and rebuild the partition-wall according as the use of the service required, and consequently is not liable to damages. And he who was at the expense of these superfluous things ought to blame himself for having exposed them to this accident, by putting them on a wall to which another had an equal right with himself. But in the present case it is quite the contrary; for it is by the fault of the neighbour that his building has thrown down the other.

<sup>f</sup> L. 24, § 10, *D. de damn. inf.*

## VIL

1579. *If the Decayed House belongs to several Owners.* — If the building, whose fall hath caused some damage, belongs to several owners, they will not be answerable each for the whole damage; but every one in proportion to the share which he had in the house that is fallen.<sup>s</sup>

## VIII.

1580. *New Works prohibited.* — Those who make any new work, that is, who make any change in the condition of the places,<sup>h</sup> whether it be in estates lying in the city or country, whether in places belonging to particular persons or in those of public use, ought to serve their own conveniency in such a manner as not to trespass in the least on the right of other persons concerned in the change which they pretend to make.<sup>i</sup> For although one may make upon his own estate whatever changes he stands in need of; and often even although they may be hurtful to other persons, as shall be explained in the following article; yet one cannot make those alterations which another person may have a right to hinder. Thus, although one may raise his house higher, and thereby prejudice his neighbour, by taking away his prospect; yet he who is subject to the service of not raising his building higher no longer has that liberty, while the service can have its use.<sup>j</sup> Thus, he who with regard to a spring of water in his estate, or a rivulet running through his grounds, might let it discharge itself according to the natural course which the waters should take, may have lost this liberty by the right which a neighbour may have acquired to have this water conveyed into his lands by a canal or conduit, which, is to discharge itself in a certain place.<sup>m</sup> And if in these cases the proprietor of a piece of ground makes any new work therein, which is hurtful either to his neighbour, or even to others, whose estates are at some distance from his, but who have a right to hinder him from making the said new work; he will be obliged to restore things to their first

<sup>s</sup> L. 40, § 3, *D. de damn. inf.*; — l. 5, § 1, *cod.*

<sup>h</sup> L. 1, § 11, *D. de oper. nov. nunt.*

<sup>i</sup> L. 1, § 4, *D. de aqua et aq. plu. arc.*; — d. l. § 11.

<sup>j</sup> See the ninth article of the second section of *Services*, and the fourth article of the sixth section of the same title.

<sup>m</sup> See the third article of the third section of *Services*, and the first article of the fourth section of the same title.

estate, and to repair the damage which he may have caused by his innovation.

## IX.

1581. *A New Work which one has a Right to make, although it may prejudice his Neighbour.*—He who in making a new work upon his own estate uses his right, without trespassing either against any law, custom, title, or possession, which may subject him to any service towards his neighbours, is not answerable for the damage which they may chance to sustain thereby, unless it be that he made that change merely with a view to hurt others, without any advantage to himself. For in this case it would be a pure act of malice, which equity would not allow of. But if the work were useful to him, as if he made in his estate any lawful repairs, to secure it against the overflowings of a torrent or river, and his neighbour's grounds were thereby the more exposed to the flood, or suffered from thence any other inconvenience, he could not be made answerable for it. Thus, he who, digging for water in his own ground, should thereby drain a well or spring in his neighbour's ground, would be liable to no action of damages on that score.\* For, in these and the like cases, these events are casualties and natural effects of the condition into which he who makes the changes has had a right to put the things. And it is not his act which causes the damage.

## X.

1582. *A Work which one cannot do to the Prejudice of his Neighbour.*—If the work which a proprietor would make in his own ground be contrary to any law or custom, or if it be an undertaking that is against a title or possession, to the prejudice of a neighbour who might thereby suffer some damage, the neighbour may hinder him from making it, and will likewise recover damages for what he shall have suffered thereby. Thus, he who digging in his own ground beyond the distance which is allowed, should endanger the foundation of his neighbour's house, would be answerable for it.†

\* L. 20, *D. de op. nov. nunt.*; — l. 21, § 4, *cod.*; — l. 8, *cod.*; — d. l. 1, § 14.

† L. 1, § 12, *D. de aq. et aq. plu. arc.*; — l. 21, *cod.*; — l. 24, § 12, *D. de damn. inf.* See the ninth article of the second section of *Services*. L. 2, § 9, *D. de aq. et aq. plu. arc.*; — l. 38, *D. de rei vind.*

‡ L. 24, § 12, *D. de damn. inf.*



## XI.

1583. *One cannot change the Ancient Course of the Waters.*— If rain-water or other waters have their course regulated from one ground to another, whether it be by the nature of the place, or by some regulation, or by a title, or by an ancient possession, the proprietors of the said grounds cannot innovate any thing as to the ancient course of the waters. Thus, he who has the upper grounds cannot change the course of the water, either by turning it some other way, or rendering it more rapid, or making any other changes in it to the prejudice of the owner of the lower grounds. Neither can he who has the lower estate do any thing that may hinder his grounds from receiving the water which they ought to receive, and that in the manner which has been regulated.<sup>a</sup> But the changes which happen naturally without the hand of man, and which cause some loss to one of the neighbours, and profit to the other, ought either to be suffered or remedied, according to the rules which shall be explained in the subsequent title.<sup>b</sup>

## XII.

1584. *Prohibition to innovate.*— He who pretends that a new work which another undertakes is prejudicial to him, ought to apply himself to the judge, who may prohibit him either to begin the work, or to continue it if it is begun, till judgment be given whether the work ought to be permitted or forbidden. And these prohibitions may be granted provisionally, upon the bare complaint of the new undertaking, if it be any ways doubtful whether it may do hurt or not.<sup>c</sup>

## XIII.

1585. *Building in Public Places forbidden.*— The building of new works in public places is forbidden, and that with much more reason than those which are made in places belonging to private persons. And such attempts are punished by fines or other penalties, according to the nature of the fact and the circumstances.<sup>d</sup>

<sup>a</sup> See the fifth and sixth articles of the first section of the following title.

<sup>b</sup> L. 2, D. de aq. et aq. plu. arc.; — l. 1, §§ 1, 10, 13, *ead.*

<sup>c</sup> L. 1, D. de oper. nov. nunt.

<sup>d</sup> L. 1, § 14, D. de oper. nov. nunt.; — d. l. 1, § 16; — d. l. § 17.

## SECTION IV.

OF OTHER KINDS OF DAMAGES OCCASIONED BY FAULTS, WITHOUT  
EITHER CRIME OR OFFENCE.\*

## ART. I.

1586. *Damage occasioned by Faults, without an Intention of doing Harm.*— All the losses and all the damages which may happen by the act of any person, whether out of imprudence, rashness, ignorance of what one ought to know, or other faults of the like nature, however trivial they may be, ought to be repaired by him whose imprudence or other fault has given occasion to it. For it is a wrong that he has done, even although he had no intention to do harm. Thus, he who, playing imprudently at mall in a place where there might be danger for those that are passing by, chances to hurt any one, will be answerable for the harm which he shall have caused.<sup>a</sup>

## II.

1587. *Failure of Deliverance of a Thing to the Owner.*— The failure in the performance of an engagement is also a fault which may give occasion to damages, which the party who fails will be liable to. Thus, a seller who refuses to deliver what he has sold, a depositary who delays to restore the thing deposited with him, an executor who detains the thing bequeathed, and all those who, having in their possession a thing which they ought to deliver up, refuse or delay to do it, are liable, not only for the damages which their delay shall have occasioned, but also for the value of the thing, if it perishes after they shall have been in fault for not delivering it; even although the thing should perish by some accident. For that accident might not have happened to the thing if it had been in the hands of the owner, or he might have disposed of it before it perished.<sup>b</sup>

<sup>a</sup> See upon this subject the second section of the title of *Interests, Damages, &c.*

<sup>a</sup> L. 1, *D. de injur.*; — l. 5, § 1, *D. ad leg. Aquil.*; — l. 9, § ult. *cod.*; — l. 10, *cod.*; — l. 44, *cod.*

<sup>b</sup> L. 5, *D. de reb. cred.* See the seventeenth article of the second section, and the third article of the seventh section of the *Contract of Sale*, and the tenth article of the third section of *Deposit*.

## III.

1588. *Damage caused by an Innocent Act.*— If there happens any damage by an unforeseen consequence of an innocent act, when no blame can be charged on the author of the act, he will not be answerable for such a consequence. For this event will have some other cause joined with that of the act, whether it be the imprudence of the person who has suffered the damage, or some accident. And it is either to this imprudence, or to this accident, that the damage ought to be imputed. Thus, for example, if any one goes across a public mall whilst people are playing in it, and the ball, being already struck, chances to hurt him; the innocent act of the person who struck the ball does not make him answerable for an event, which ought to be imputed either to the imprudence of the person to whom it has happened, if he could not be ignorant that that was a public mall, or to a mere accident, if that act was altogether unknown to him, and if nothing of imprudence could be imputed to him who struck the ball.\*

## IV.

1589. *Precautions to be used in Works from whence any Damage may happen.*— Those who make any works, or do any other thing from whence may ensue some damage to other persons, will be answerable for the damage, if they have not taken the necessary precautions to prevent it. Thus, masons, carpenters, and others, who, by the help of scaffolds and machines, carry up their materials, those who from the top of a tree cut down the branches of it, ought to give warning to the persons whom their work might put in danger; and if they do it not, and that timely, they will be answerable for the damage which shall happen from thence, and be liable to other penalties, according to the circumstances. Thus, huntsmen or others, who dig holes or ditches for catching of wild beasts, in the highways or in other places, where they have no right to do it, will be answerable for the damage which shall happen thereby.<sup>d</sup>

## V.

1590. *Ignorance of what one is obliged to know.*— We must reckon among the damages caused by faults those which happen

\* L. 9, § ult. *D. ad leg. Aquil.*; — l. 11, *cod.*. See the ninth article.

<sup>d</sup> L. 31, *D. ad leg. Aquil.*; — l. 7, § 8, *D. quod vi aut clam.*; — l. 28, *D. ad leg. Aquil.*

through ignorance of things which one ought to know. Thus, when an artificer, for want of knowing what belongs to his profession, commits a fault which causes some damage, he is answerable for it. Thus, if it happens that a carman not having rightly laid the stones which he has loaded on his cart, one of them falls out and does some harm, he must answer for it.\*

## VI.

1591. *Fire.* — Fire almost never happens without some fault, at least that of imprudence, or negligence; and those through whose fault, let it be never so slight, a fire has happened, will be answerable for all the damage it does.†

## VII.

1592. *Damage done to avoid a Danger.* — It happens sometimes that a voluntary act causes damage, and yet that he who is the cause thereof is not answerable for it. Thus, for example, if a sudden gust of wind drives a ship upon the anchor-cables of another ship, or upon the nets of fishermen, and the master of the ship that is thus drove by the wind, not being able to disentangle himself any other way, orders his men to cut the cables, and the nets, he will not be answerable for this damage, which the said accident rendered necessary. And it is the same thing with respect to those who, in a fire, not being able to save a house which is just going to take fire, throw down the said house in order to preserve the others. For, in these kinds of events, it is the accident which causes the loss, and every one bears that part of it which falls to his share.‡

## VIII.

1593. *Damage which another Person might have prevented.* — Those who, having it in their power to prevent a damage which

\* L. 9, § 5, *D. locat.*; — § 7, *Inst. de leg. Aquil.*; — l. 7, § ult., l. 8, *D. ad leg. Aquil.*; — l. 27, § 33, *cod.* See the fifth article of the second section.

† L. 3, § 1, *D. de off. prof. vig.*; — l. 9, *D. de incend.*; — l. 44, *D. ad leg. Aquil.*; — l. 27, § 9 *cod.*

‡ L. 29, § 3, *D. ad leg. Aquil.*; — l. 49, § 1, *cod.*; — v. l. 3, § 7, *D. de incend.*; — l. 7, § 4, *D. quod vi aut clam.* See the second article of the second section of *Interest, Costs and Damages.* We have not put down in this article, for the case of fire, the example given in this law, of a private person who throws down his neighbour's house adjoining to his own; for that liberty presupposes a necessity of doing it for the good of the public, of which a private person ought not to be judge. But in the cases of this article orders are given by the magistrates or by the multitude, who, seeing the imminent danger, have a right to provide against it.

some duty obliged them to prevent, have neglected to do it, may be made answerable for it according to the circumstances. Thus, a master who sees and suffers the damage done by his servant, when he might have hindered it, is answerable for it.<sup>1</sup>

## IX.

1594. *Damage happening by an Accident, which was preceded by some Act that gave Occasion to it.*—When any loss or damage happens from an accident, and when the act of some person, which is mixed with the accident, has been either the cause or occasion of the said event; it is by the nature of the act, and by the connection which it may have with what has happened, that we ought to judge whether the said person should be made to answer for the damage, or should be acquitted of it. Thus, in the cases of the first and fourth articles of this section, the event is imputed to him whose act has occasioned some damage; thus, on the contrary, in the cases of the third and seventh articles, the event is not imputed.<sup>1</sup> Thus, for another case different from those of all these articles, if a person who takes upon him the care of the affairs of another without his knowledge, or a tutor, guardian, or other administrator, having received a sum of money for the use and benefit of the person whose affairs are under his management, lays up the said money by him for some time, without putting it to any use, when he might have paid off with it debts which his administration obliged him to acquit, whether to other creditors or to himself, if he was likewise a creditor; and if it happens that the said money is carried off by robbers, or perishes through fire, or that the value of the coin be diminished; that loss might fall upon the said person, if he had no reason to keep the money by him, and if it was his fault that he did not employ it, either to pay what was owing to himself, or to discharge other creditors, or to apply it to other uses; or the loss may fall upon the persons for whose account the money was received, if any just cause had induced the receiver to defer the employing of it. And this will depend on the nature of the conduct which the said person shall have observed, and on the other circumstances, which may either oblige him to make good the loss, or discharge him of it.<sup>2</sup>

<sup>1</sup> L. 44, § 1, et l. 45, D. ad leg. Aquil.; — l. 4, C. de nox. act.

<sup>2</sup> See the first and fourth articles, as also the third and seventh, of this section.

<sup>3</sup> L. 13, D. de negot. gest.; — l. 30, § 3, D. ad leg. Aquil. We have not inserted in this

## X.

1595. *Damage caused by an Accident preceded by a Fault.*— If the accident is a consequence of an unlawful act, and if there follows from it any damage, he whose act has given occasion to it will be liable to make good the damage; and that with much more reason than if the accident were only a consequence of some imprudence, as in the cases of the fourth article. Thus, for example, if a creditor takes, without the authority of justice, a pledge from his debtor against his consent, and if the said pledge chances to perish by some accident in the hands of that creditor, he shall be accountable for it.<sup>m</sup>

## TITLE IX.

## OF ENGAGEMENTS WHICH ARE FORMED BY ACCIDENTS.

1596. We shall see in this title a kind of involuntary engagements, and which have no other cause besides mere accidents. By accidents are meant the events which do not depend on the will of those to whom they happen, whether the said events be the cause of gain or of loss. Thus, to find a treasure and to lose one's purse are accidents of these two kinds.

1597. Accidents happen either by the act of man, such as a robbery, a fire; or by a pure effect of the providence of God and of the ordinary course of nature, such as thunder, lightning, a shipwreck, an inundation; or by an effect proceeding partly from a natural cause, and partly from the act of man, such as a fire which happens by stacking up hay before it is well dried.

article the case related in this thirtieth law, § 3, *D. ad leg. Aquil.*, which declares that, if he who caused his stubble to be burnt had taken all the precautions that were necessary, he would not be answerable for the burning of his neighbour's corn, which was occasioned by a sudden gust of wind. For it would seem that that event ought to have been foreseen, and that it might have even been prevented by plucking up by the roots all the stubble that was near to the neighbour's corn, or putting off the burning of the stubble till harvest was over; and, in a word, that, in all such cases where we ought not to do the thing intended without taking the necessary precautions for preventing the damage which may ensue from thence to other persons, we ought either quite to abstain from that which may cause any damage, or take upon ourselves the event, if we run the hazard of it. And likewise the law of God seems in this case to oblige, without any distinction, him who has kindled the fire to repair the damage which it shall have caused. See *Exod. xxii. 6.*  
<sup>m</sup> *L. 30, D. de pign. act.*

1598. We must likewise distinguish, in the accidents in which the act of man has a share, two sorts of acts. One is of those in which there is some fault; as if one, playing at mall in a highway, wounds a person that is going by. And the other is of those which are innocent, and where nothing can be imputed to the author of the act; as if the same case had happened in a public mall, through the fault of him who crossing it rashly was wounded.

1599. When the accident is a consequence of some fault which has given occasion to it, he whose act has been the cause or occasion of the accident ought to repair the damage caused by it. In which case, his engagement is more the effect of his fault than of the accident; and this sort of engagements is a part of the subject-matter of the foregoing title. But in the present title we shall speak only of such engagements as have no other cause besides that of a mere accident. The accidents which are not attended with any fault may have divers consequences with respect to engagements. Sometimes they dissolve the engagements. Thus, a seller is discharged from the obligation to deliver the thing sold, if it perishes without his fault, whilst he is not in delay to deliver it; and the buyer will nevertheless be liable to pay the price.<sup>a</sup> Sometimes the accident lessens the engagement, as when a farmer suffers a considerable loss by an unusual barrenness, by a shower of hail, by a frost, or other accidents.<sup>b</sup> At other times the accident makes no change in the engagement, although it causes loss. Thus, if it happens that he who had borrowed money loses it by a robbery, by fire, or other accident, he is nevertheless obliged to repay it, as much as if he had employed it usefully.<sup>c</sup> And, in fine, it happens by another effect of accidents, that they form engagements between one person and another. And it is this last effect of accidents which shall be the subject-matter of this title; the others having their places in the matters to which they have relation.

1600. When we speak here of the engagements which arise from accidents, we do not mean to comprehend under them that infinite multitude of engagements under which God puts men, by those sorts of events which oblige them to render to one another the different duties which the several conjunctures demand of them; such as to help him who is fallen, to assist with our goods

<sup>a</sup> See the twenty-first article of the second section of the *Contract of Sale*.

<sup>b</sup> See the fourth and following articles of the fifth section of *Letting and Hiring*.

<sup>c</sup> See the second article of the third section of the *Loan of Things to be restored in Kind*.

those who have lost theirs, and a thousand others of the like nature. But we treat only here of the engagements which are such that the civil laws allow those who are under them to be constrained to the performance of them, as will appear from the several examples which shall be produced in the first section, which is made up of those different examples, in order to show in which manner these sorts of engagements are formed: and in the second section we shall explain all their particular consequences.

## SECTION I.

IN WHAT MANNER ARE FORMED THE ENGAGEMENTS WHICH ARISE FROM ACCIDENTS.

### ART. I.

1601. *Of him who finds a Thing that is lost.* — He who finds a thing that is lost ought to restore it to its owner, if he knows or may know to whom it belongs; and if he keeps it without an intention to restore it, or without endeavouring to discover the owner, he commits a theft.<sup>a</sup>

### II.

1602. *Of that which is left on another's Ground by an Inundation.* — If an inundation throws down a house, and carries away the materials or movables of it into some ground, the proprietor or possessor of the said ground is obliged to let the master of the said house have access to the ground, and to suffer him to carry away that which the inundation hath left on it. And it would be the same thing with regard to a boat or any other thing carried away by the force of the waters.<sup>b</sup>

### III.

1603. *Of that which is thrown into the Sea in a Danger of Shipwreck.* — If in a danger of shipwreck it be found necessary to

<sup>a</sup> L. 43, § 4, *D. de furt.*; — d. l. § 7; — Deut. xxii. 1, 2, 3; — Levit. vi. 3.

<sup>b</sup> The engagements of him who finds a thing, and of him to whom it belongs, shall be explained in the first and second articles of the second section.

We are not to reckon treasures in the number of things lost; for we call only that a treasure which having been hid, the owner of it is not any more known. See, concerning treasures, the seventh article of the second section of *Possession*.

<sup>c</sup> L. 5, § 4, *D. ad exhib.* See the third, fourth, and fifth articles of the second section.



throw overboard a part of the lading in order to save the rest, those whose baggage or goods have been saved are obliged to bear their share of the loss of that which hath been thrown overboard for the common safety, according to the rules which shall be explained in the following section.

## IV.

1604. *Provision of Victuals in a Common Danger.*— If in a voyage by sea, or upon any other the like occasion, where many persons may chance to be in company together, the provisions of victuals fall short, and it be found that some of the company have some provisions in store for themselves, when it is not possible to procure any for the other passengers any other way; what some of the company have in store for their own particular use becomes common to the whole company.<sup>a</sup>

## V.

1605. *How the Change of Places which has happened by an Accident may be repaired.*— If an accident makes a change in the state or condition of some places, by which any one is damaged, and if it be just to restore things to their first condition, this event obliges those in whose ground any work is to be made in order to restore things as they were at first, to give leave to him who suffers the damage to do the work, or to do it themselves, or to contribute towards it in case they be under an obligation to do it. Thus, for example, if a running water which crosses the grounds of several persons flows back on the upper grounds because of the quantity of dirt and mud which it carries along with it, or by reason of some other obstacle, those who suffer damage or inconveniency from it may oblige the proprietor of the ground, where the course of the river ceases to be free, to suffer that the things be restored to their first condition, or to do that work wholly himself, or to contribute towards it, according as he shall happen to be under an obligation of doing the one or the other. And if there happen any other changes of the like nature which ought to be repaired, the same equity requires that those who suffer any damage by them be allowed to restore the things to the condition they were in before. For although these changes fall out naturally,

<sup>a</sup> L. 1, D. de leg. Rhod. de actu. See the sixth and following articles of the second section.

<sup>b</sup> L. 2, § 2, in f. D. de leg. Rhod. See the eighth article of the second section.

and even without the act of man, yet if they can be remedied after they have happened, those who suffer such losses ought not to be deprived of the remedies that are lawful and possible, provided that in reëstablishing the things they do no harm, or that they make good any damage they may chance to do.\* But if the change were of such a nature, that it would not be just to restore the things to their first condition, as if a flood, having loosened the rocks that were in a ground, had transported them to another, and by that means had made one of the grounds better than it was, and the other worse; that event being a pure effect of the divine providence, which, having changed the face of the places, hath likewise changed the possessions of the proprietors of the said grounds; none of the proprietors can pretend to make any new change in the ground of the other, except by his consent. And he cannot even do any thing in his own ground, but that which he may do without encroaching on the rights of his neighbours.

## VI.

1606. *If the Change cannot be repaired.*—If the change of the places that has happened by an accident be irreparable, the loss or the gain which shall follow from the said change will accrue to those to whom the event shall have been profitable or hurtful, and there will lie no obligation on the one to indemnify the other. Thus, for example, if a river insensibly leaves one side and extends itself more towards the other, what ground it takes away from one proprietor is lost to him, and what it leaves to the other is an addition to his estate.<sup>f</sup> Or if a river changes its channel, the places which it occupies by its new course will be lost to those who were the proprietors of them, and the proprietors of the lands adjoining to the old channel will have the benefit of what shall be thereby added to their grounds;<sup>g</sup> and yet there is no engagement formed between those who gain by the change, and those who lose by it, for the one does but acquire what the other loses. And those who by the change of the course of the river have lost their grounds, have no right to the lands which the river did once occupy for its channel, and which it has abandoned. But

\* L. 2, § 6, *D. de aqua et aq. plu. arc.*; — v. d. l. § 4. See the following article.

<sup>f</sup> L. 1, *C. de alluv.*; — § 20, *Inst. de rer. divis.*

<sup>g</sup> § 23, *cod.*

they ought to bear with an event which hath no other cause besides the providence of God, which has deprived them of their possession.<sup>h</sup>

## VII.

1607. *Mixture of Things belonging to several Persons.*—When it happens that two or more things belonging to several masters are, against their will or without their knowledge, so mixed together that they cannot easily and without inconvenience be separated, so as to give back to every one his own; this whole mass becomes common to the persons whose things are mixed; not so as for all of them to have a common undivided right to the whole, for the one has no right to the thing of the other that is mixed with his, but their right is in proportion to the share which every one has in the whole mass. And this event forms among them the engagement either to divide the thing in the manner that is possible, or to do one another justice otherwise, by valuing every one of the things which have been mixed together. Thus, for instance, if two pieces of gold belonging to two persons have been melted down into one mass, or a stuff hath been made of wool belonging to several owners, or things of different kinds have been mixed together any other manner of way, such as different metals, or liquors of different sorts; in these cases it is necessary either to divide the thing, if it is possible to divide it, and to give to every one in proportion to the value he has in the whole mass; or to make an estimate of the whole, and to divide the price on the same foot. But if this mixture hath been made voluntarily by the owners of the things, the engagement in this case is formed by covenant, and the mass is common among them, according to the conditions which they have agreed on.<sup>i</sup>

## VIII.

1608. *One may seek for what he has left in another's Ground.*—If by some accident it happens that one has hid in some secret place in a ground belonging to another person, either money or other things, which afterwards he or his heirs are desirous to carry away, the owner of the ground will be obliged to suffer him or

<sup>h</sup> L. 2, § 6, *D. de aqua et aq. pluvi. arc.* See the eighth article of the second section of Possession.

<sup>i</sup> § 27, *Inst. de rerum divis.*

them to take away the things, provided the damage which may be done by removing them be made good.<sup>1</sup>

## IX.

1609. *Engagements reciprocal or not reciprocal.* — Of the engagements which are formed by accidents, some of them are reciprocal; and oblige one party as well as the other; and others are obligatory only on one side. Thus, in the case of the first article, if he who hath found a thing that is lost knows the owner of it, and can immediately restore it to him without being at any charges, the obligation is only on his part. But if he has been at any expense, either in advertising it or having it cried, in order to find out the owner or for conveying it to him, the owner in this case is bound to reimburse the finder of what he is out of pocket on his account. So that in this case the engagement will be mutual; and in all the other cases it is easy to discern whether the engagement be reciprocal or not.<sup>m</sup>

## X.

1610. *Loss and Gain without Engagements.* — All the accidents which cause gain or loss do not, however, always form engagements. And if, for example, a ship that in a storm is driven against another happens to damage it, that accident does not lay the master of the vessel that hath damaged the other under any manner of engagement, unless the damage hath happened by the master's fault, or by the fault of persons for whom he is answerable. For it is a bare effect of this accident; and sometimes even he who suffers damage by an accident, from whence there ariseth profit to another, cannot for all that pretend to any indemnity on account of his loss, as in the cases of the sixth article.<sup>n</sup>

## XI.

1611. *Different Effects of Accidents, as to the Consequence of the Loss.* — It follows from the foregoing articles, that no general rule

<sup>1</sup> *Thesaurus meus in tuo fundo est, nec eum pateris me effodere. — Labeo ait, non esse iniquum juranti mihi non calumnie causa id postulare, vel interdictum, vel judicium ita dari, ut, si per me non stetit quominus damni infecti tibi operis nomine caveatur, ne vim facias mihi, quominus eum thesaurum effodiam, tollam, exportem. L. 15, D. ad exhib.* The case of the law here quoted is not properly a treasure. See the seventh article of the second section of *Possession*.

<sup>m</sup> This is a consequence of the foregoing articles.

<sup>n</sup> L. 29, § 2, D. ad leg. Aquil.; — d. l. § 4.

can be given whereby to distinguish the accidents from whence there may arise engagements, whether on one side only or on both, from those which produce no manner of engagement at all. But these differences depend on the conjunctures which diversify the events, and which will guide us in making a right judgment of the obligations which every one of the persons whom the consequences of the accident may concern is under. Thus, when a ship falls into the hands of pirates, if she is ransomed, all the parties concerned contribute towards the ransom in proportion to what they save; and there is formed among them an engagement that is common to them all. But if the pirates carry off only a part of the lading of the ship, without touching the rest, the loss will fall on those whose goods have been taken away, and the owners of what remains will not be obliged to bear their share of the loss. And these two different rules in accidents of the same nature are founded on one and the same principle, that is common to these two several events, namely, that the loss falls on the owner of the thing that is lost. And it is for this reason that the loss of the money which is given for ransoming the ship is common to all those who would have suffered by the loss of the ship; and that the loss of the goods that are taken away by robbery falls on those who are owners of them.\*

## SECTION II.

OF THE CONSEQUENCES OF THE ENGAGEMENTS WHICH ARE FORMED  
BY ACCIDENTS.

### ART. I.

1612. *Engagements of him who has found a Thing that is lost.*  
— He who has found a thing that is lost is obliged to preserve it, and to take care of it, in order to restore it to its owner. And if he does not know to whom it belongs, he ought to inform himself by such ways as are in his power, even by making public intimation of it in order to find out the owner, if the thing be worth the pains, and if it be consistent with prudence to take that course.\*

\* L. 2, § 3, *D. de leg. Rhod.*

\* See the texts cited on the first article of the foregoing section. L. 45, § 8, *D. de furt.*  
See the first article of the first section. *Deut. xxii. 3.*

And when he does restore it, whether it be money or any other thing, he cannot detain any part of it, nor demand any thing for having found it.<sup>b</sup> But he will recover only what expenses he has been at, as shall be explained in the following article.

## II.

1613. *Engagement of him who recovers what he had lost.* — The person to whom one restores the thing which he had lost is obliged on his part to repay the money that has been laid out, either in keeping the thing or in delivering it to him; as if it was some strayed beast which it was necessary to feed, or that the carriage of the thing from one place to another had obliged the person in whose custody it was to be at some charges; or if any money has been laid out in advertisements, or having the thing cried, in order to give notice to the owner. And if he who delivers the thing to the owner be not the same person who found it, and if he gave any thing to get it from the finder, he will recover it of the owner.<sup>c</sup>

## III.

1614. *The Right which one has to take out of another's Ground any Thing of his that has been thrown there by Accident.* — The proprietor of a ground on which is thrown the rubbish of a building that is fallen down, or that which a flood hath carried away from another's ground, is obliged to suffer him who has had the loss to take away what remains, and to allow him such free access to his ground as is necessary for that end.<sup>d</sup> But upon the conditions that are explained in the following article.

## • IV.

1615. *Sequel of the foregoing Article.* — In the cases of the foregoing article, he who desires to have back the materials of his building that is fallen down, or that which a flood hath carried away from his land and thrown upon another man's ground, is

<sup>a</sup> L. 43, § 9, *D. de furtis*. Although he who restores a thing which he has found has no right to demand any thing for it, yet, nevertheless, if the finder be a poor body, he may take lawfully and honestly what the owner shall think fit to give him; although it would be very dishonorable in any other person to receive the least thing whatsoever on that account.

<sup>b</sup> L. 2, § 5, in *f. D. de aqua et aq. plu. arc.*

<sup>c</sup> See the text cited upon the second article of the first section, and those which are cited in the following article. L. 9, § 1, *D. de damn. inf.*

obliged on his part not only to indemnify the proprietor of the said ground as to what damage shall happen to be done by his taking away the things which have been thrown upon it, but he is, moreover, bound to repair all the damage which has been already done to the ground by the things since they were cast upon it.\* But if he chooses rather not to take away any thing, he will owe nothing; for if he abandons to the proprietor of that ground all that has been cast upon it, he is not bound to make good a damage that has happened by the bare effect of that accident: and it is enough that he loses what the accident has carried away from him.†

## V.

1616. *Another Consequence of the Third Article.*—If he whose materials, or other things, have been thrown by these accidents on the estate of another person, be desirous to take them away, he will be obliged, besides the making reparation for the damage sustained by the owner of the ground, to take away as well the unprofitable stuff that can be of no manner of use, as that which is useful, and which he is desirous to take away, and to clear entirely the surface of the ground on which the things have been thrown.‡

## VI.

1617. *Contribution for the Loss of what is thrown into the Sea in a Danger of Shipwreck.*—When, in order to lighten a ship that is in danger of shipwreck, part of the cargo is thrown overboard, and the ship by that means is saved, this loss is common to all those who had any thing to lose in that danger. Thus, the master of the ship, all those whose goods or effects have been saved, and those whose goods have been thrown overboard, will bear every one of them their share of the loss, in proportion to the interest they had in the whole. And if, for example, the ship and the whole cargo were worth a hundred thousand crowns, and what has been thrown overboard was valued at twenty thousand crowns, the loss being a fifth part, every one of the parties concerned will contribute a fifth part of the value of what they save, which will

\* L. 8, *D. de incend.*; — l. 9, § 3, *D. de damn. inf.*; — d. l. 9, § 2.

† See the texts quoted on the fourth article of the third section of the title of *Damages occasioned by Faults*.

‡ L. 9, § 2, *D. de damn. inf.*; — l. 7, § ult. *cod.* See the fourth article of the third section of the title of *Damages occasioned by Faults*.

make in all sixteen thousand crowns; and by this contribution those who had lost the twenty thousand crowns, recovering sixteen thousand of them, will be losers only of a fifth part, as all the others.<sup>b</sup>

<sup>b</sup> L. 1, *D. de Rhodia*; — l. 2, § 2, *cod.*; — l. 2, § 4, *cod.* Upon what foot is it that we must regulate the contribution for indemnifying those whose goods or other effects have been thrown overboard? It is said in the second law, § 4, *D. de lege Rhodia*, that it ought to be on the foot of the estimate as well of what is lost as of what is saved; that it is no matter that the things lost could have been sold for more than they cost, because the business is to make up a loss which one has sustained, and not a gain which they have failed to make; but that as to the things which have been saved, and which ought to bear their part of the contribution, they ought to be valued, not upon the foot of what they cost, but upon the foot of what they may be sold for. This is the meaning of that text, of which here follow the words: — *Portio autem pro æstimatione rerum, quæ salvæ sunt, et earum quæ amissæ sunt, præstari solet. Nec ad rem pertinet, si hæ, quæ amissæ sunt, pluris venire poterunt: quoniam detrimenti, non lucri fit præstatio: sed in his rebus, quarum nomine conferendum est, æstimatio debeat haberi, non quanti emptæ sint, sed quanti venire possunt.* If it be just that the estimate of the things which are saved should be made upon the foot of what they may be sold for, because it is that value which has been saved from the danger, why should not that which has been lost in order to save the rest be estimated on the same foot? And if we suppose, in the case of two merchants who had bought goods of the same kind, at the same price, in the same place, to be sold again in the same seaport town whither the ship was bound, that the goods of one of the merchants were thrown overboard to save the ship at the entry into the port, where it was in danger of being cast away, and that the goods which are preserved are sold immediately in the said seaport town for more than they cost, would it not be just that those which have been lost only to save the others should be valued on the same foot? since there was no reason for throwing overboard the goods of one merchant more than the other, nor for distinguishing their condition. To which we may add, that, as we shall observe on the fifteenth article, the contribution ought not to be made till after the ship is got into port, and in safety; and that as it is only then that the contribution is to be made, it seems reasonable that the whole should be estimated on the foot of what the things are worth at the time of unlading, all charges being deducted. And it is probably for these very reasons that regulations have been made, ordaining that the goods which have been thrown overboard should be estimated on the same foot as those which have been saved, and according to the price for which they should be sold. See the laws of *Oleron*, art. 8, and the ordinances of *Wisbuy*, art. 20 and art. 39. But seeing the goods are not all sold in the port where the ship arrives, and that many of them are often to be farther transported by sea or land, and have consequently new dangers to undergo, and seeing there may happen many diminutions of the profit in the sales, and even losses by several accidents, it would be neither just nor possible to regulate the contributions on the foot of what the goods shall be sold for, after that the goods and owners are dispersed in several places. So that the contribution being to be made in the port of delivery, it seems a necessary consequence that the value of the goods should be settled in the said port, not upon the foot of what the goods shall be sold for, which it is impossible to know; nor upon the foot of what they cost at first, as well for the reasons that have been already remarked, as because it would not be possible to know justly the prime cost, and that such a valuation might be liable to a great many cheats; but the estimate ought to be made on the foot of the price at which the goods and other effects may be reasonably valued at their arrival in the port, according to the several views and different regards which may help us to make a just estimate.



## VII.

1618. *Upon what Foot the Contribution is paid.* — Every thing that is saved from shipwreck by throwing the goods overboard into the sea pays contribution according to its value, without any distinction between that which is of less burden, such as jewels, and that which is of greater, such as metals. For it is the value, and not the weight, of the thing that has been saved from perishing that comes into consideration: and so the master of the ship contributes in proportion;<sup>1</sup> but those on board the ship do not contribute any thing for their persons,<sup>1</sup> except it be for their clothes, their rings, and other things which they have about them.<sup>2</sup>

## VIII.

1619. *Victuals pay no Contribution.* — The provisions which are put on board the ship, for no other end but to be consumed during the voyage, pay no contribution;<sup>2</sup> for these kinds of things are for the common use. But we must not place in this rank corn, wine, and other things of the like sort, which are not put on board the ship to be there consumed, but are there as goods to be transported from one place to another.

## IX.

1620. *Precaution for the Security of the Contribution.* — Those whose goods have been thrown overboard to save the ship may, for their security, hinder the unlading of the goods that remain on board the ship till they have paid their proportion of the loss, or may procure them to be attached in case they are landed.<sup>3</sup>

## X.

1621. *Of the Damage that happens to the Ship.* — If the ship is damaged by a storm, and loses any of her masts, yards, or other parts of the ship, the expense of refitting the ship and of repairing what was lost will fall upon the master of the ship; for this expense is more for fitting out the ship than for preserving the goods, and the master of the ship is bound to furnish it in a good condition for transporting the things he takes charge of, in the same manner as workmen furnish their tools, and bear the loss if any of them break in the working.<sup>4</sup>

<sup>1</sup> L. 2, § 2, D. de leg. Rhod.

<sup>1</sup> D. §.

<sup>2</sup> D. §.

<sup>2</sup> L. 2, § 2, in f. D. de leg. Rhod. See the fourth article of the first section.

<sup>3</sup> L. 2, D. de leg. Rhod.

<sup>4</sup> L. 2, § 1, D. de leg. Rhod.; — l. 6, cod. See the following article.

XI.

1622. *If because of Danger the Masts of the Ship are cut down, the loss of them is common.* — If to prevent a shipwreck the masts and yards are cut down and thrown overboard, or other things are thrown overboard to lighten the ship that it may not perish, that loss will be common. For it is not an effect that the storm hath caused, as if the violence of the storm had broke the masts or yards, or done any other damage which would be within the case of the foregoing article; but it is an effect of the fear of the common danger, and therefore the loss of it ought to be common.<sup>a</sup>

XII.

1623. *No Contribution due if the Ship is cast away.* — If the ship is cast away, and in the wreck some save their goods or other things, they will not be obliged to contribute any thing on their part towards making up the loss which the others suffer. For it is not by the loss of the ship and of the other things which perish that they save theirs; but every one saves what he can out of the common wreck; and the contribution takes place only when those are to be indemnified whose loss hath saved what remains to the others.<sup>r</sup>

XIII.

1624. *If to lighten a Ship, that it may get into Port, Goods are unladen into a Lighter, and the Lighter be cast away.* — If to lighten a ship, that it may be able to enter into a river, or into a port, it be necessary to take out a part of the lading, and that what has been put on board a lighter happens to perish before it gets to land; that loss will be common, and what has been left in the ship must contribute to make up the loss. For it was for the interest of the ship that the goods were put on board the lighter.<sup>a</sup>

XIV.

1625. *If in the same Case the Ship is cast away, and not the Lighter.* — If in the case of the foregoing article the ship is cast away, and the lighter gets safely into port, there will be no contribution for the goods lost on board the ship, but the loss will fall

<sup>a</sup> L. 3, D. de leg. Rhod.; — l. 5, § 1, eod.; — l. 2, § 1, in f. eod.

<sup>r</sup> L. 5, D. de leg. Rhod.; — l. 7, D. eod.

<sup>a</sup> L. 4, D. de leg. Rhod.

upon those to whom the goods appertained. For the unlading of the goods into the lighter was not done for the advantage of those to whom the goods belonged; and the loss of the ship did no ways contribute to the saving of the goods put on board the lighter.\*

## XV.

1626. *If a Vessel saved from Shipwreck by throwing Goods overboard is cast away in another place, and some of the Goods saved out of the Wreck.* — If a ship that has been saved from one danger of shipwreck, by throwing some of the goods overboard, happens afterwards to be cast away in another place; and that, by the help of divers or otherwise, a part of what was lost in the shipwreck is recovered; those whose goods have been recovered out of the wreck must contribute to make up the loss of what has been thrown overboard in the first danger.<sup>a</sup> For the goods which are recovered out of the wreck would have perished in the first danger, had it not been for the loss of the things that were then thrown overboard.

\* *L. 4, D. de leg. Rhod.* If it had been agreed, when the goods were unladen out of the ship into the lighter, that, if the ship alone or the lighter alone should happen to be cast away, the loss of either should be common, that agreement would be executed, there being nothing unlawful in it. Might it be said in the case where the ship is cast away, when no such agreement had been made, that such a covenant was understood, although the parties had forgot to make express mention of it; and that, the ship having been lightened for the good of all the parties concerned, and the most valuable goods, perhaps, put on board the lighter with a common design of saving the whole lading of the ship, the intention of all the parties had been to make the events common to all, and that, as in the case of the lighter's being cast away, the loss of the goods on board the lighter was to be common to those who had saved their goods that were on board the ship, the condition should be reciprocal, and that the ship being cast away, the loss ought likewise to affect those who had saved their goods that were on board the lighter? Or must it not be said, on the contrary, according to the meaning of the law quoted upon this article, that, the goods having been unladen into the lighter without any agreement, and with no other view but barely to lighten the ship that it might get into port, the intention of all parties concerned was, that the goods left on board the ship should answer for the danger of those put on board the lighter with design to save the ship; and that if the said lightening of the ship did not preserve them from the danger, that then every one should bear his own loss?

<sup>a</sup> *L. 4, § 1, D. de leg. Rhod.* It follows from this rule, that the contribution is not to be made till after the ship is arrived in the haven. For if the vessel which had been saved from shipwreck by throwing goods overboard perishes afterwards, before it gets to land, the loss of what was thrown overboard in the first danger becoming unprofitable to those who suffer the second loss, there will be no contribution due from them. But if, in the second loss, any save a part of their goods out of the wreck, they will be bound to contribute according to the rule explained in this article.

## XVI.

1627. *If one recovers his Goods that were thrown overboard in the First Danger.* — If, in the case of the foregoing article, he whose goods had been thrown overboard in the first danger happens to recover them, he will not be bound to contribute towards making up the loss of what perished in the second danger. For it is not by the means of this loss that he recovers what he lost in the first danger.\*

## XVII.

1628. *When the Things thrown overboard are recovered, the Contribution for them ceases.* — If the things that have been thrown overboard chance to be recovered, or a part of them, the contribution for the loss of them will cease in proportion. And if the contribution has been already paid, those who have received it must restore it to the others.†

## XVIII.

1629. *If, by the throwing of some Goods overboard, others which remain in the Ship are damaged.* — If, in a danger which hath made it necessary to throw goods into the sea, it happens that other goods, being uncovered by the throwing of the uppermost goods into the sea, have by that means received some damage; as if the waves of the sea have got into them, and spoiled them; that loss will be made good by contribution, as being a sequel of the loss of the goods thrown overboard.‡ And the owner of those damaged goods will contribute on his part for the loss of the goods that were thrown overboard, but only upon the foot of the value of his goods after they have been damaged; for it is only that value which he saves.§

\* L. 4, § 1, in fine, D. de leg. Rhod. See the following article.

† L. 4, § 7, D. de leg. Rhod.

‡ L. 4, § 2, D. de leg. Rhod.

§ D. l. 4, in fine.

## TITLE X.

## OF THAT WHICH IS DONE TO DEFRAUD CREDITORS.

1630. *The Subject-Matter of this Title.*—Although the frauds done in prejudice of creditors be commonly transacted by agreements between the debtors and those who are in the secret with them, yet the engagements which arise from the said frauds, and which lay those who are accessory to the fraud under an obligation to the creditors, are nevertheless of the number of those engagements which are formed without a covenant; for there is no manner of covenant that passes between the accessories to the fraud and the creditor.

1631. The frauds committed by debtors and their accomplices, to make creditors lose what is due to them, are of several sorts, and form the engagements which shall be the subject-matter of this title. As to this matter of frauds done to the prejudice of creditors, it is to be observed, that the frauds which debtors may do by making assignments of their immovables are much less frequent, than as they were under the Roman law; for the Romans contracted often without writing;<sup>a</sup> and even a mortgage could be acquired by an unwritten covenant, and by a bare paction;<sup>b</sup> which rendered all frauds easy. But according to our usage, all contracts which exceed the value of one hundred livres ought to be in writing;<sup>c</sup> and a mortgage is not acquired except by a deed executed in the presence of public notaries, or by the authority of the judge. Thus creditors have their security on the immovables, or real estate of their debtors, by a mortgage, which they cannot be defeated of unless by forged deeds, which it is not an easy matter to accomplish, because even the forged deed must be made by notaries public, or by persons who counterfeit their hand and seal.

1632. We have not put down in this title the rule of the Roman law, which leaves the debtor at liberty to renounce the successions that may fall to him, either by testament or without testament, although his creditors receive thereby prejudice.<sup>d</sup>

<sup>a</sup> *Toto tit D de reb obl ;—Inst eod*

<sup>b</sup> See the twelfth article of the first section of Covenants.

<sup>c</sup> *L. 6, § 2, D quæ in fraud cred*

<sup>d</sup> *L. 4, D. de pign.*

Which was founded upon this, that every body may abstain from augmenting his estate.\* So that they did not look upon any thing as a fraud done to the prejudice of creditors, except what was a diminution of the estate which the debtor had already acquired. Neither did the Romans reckon that among the frauds done to the prejudice of creditors, when an heir or executor paid the total of legacies and bequests in trust, without retaining those portions which are called the *Falcidian* and *Trebellianic* portions, of which we shall treat in the second part of this work; because it was thought that the heir or executor had the liberty to deprive himself of that which the law gave him right to retain out of legacies and bequests in trust, and that he might thus fully perform the will of the dead. And the reason which induced us not to put down these rules here is because there are some customs which direct that, if a debtor renounces a succession that is fallen to him, his creditors may demand to be substituted to his right, that they may accept the succession, if they hope to find their account in it. And this does no harm to the debtor; for if the succession be profitable, it is but just that his creditors should reap the benefit of it; and if, on the contrary, it be burdensome, they do not any way engage him, and oblige only themselves to the charges of the succession. And as to the portions allowed to be detained by the *Falcidian* and *Trebellianic* laws, if, the legacies and bequests in trust not being as yet paid by the heir or executor, his creditors put a stop to the payment of them, that the *Falcidian* and *Trebellianic* portions may be deducted, it seems to be reasonable that they should be allowed to use the right of their debtor. For it is natural and agreeable to our usage, as also to the rules of the Roman law, that creditors may exercise all the rights and actions of their debtors, as it is expressly said in the first law, *Cod. de præst. pign.*, of which these are the words:—*Si prætorium pignus quicumque iudices dandum alicui perspexerint: non solum super mobilibus rebus, et immobilibus, et se moventibus, sed etiam super actionibus quæ debitori competunt, præcipimus hoc eis licere discernere.* To which we may add, that it may be that the creditor had reason to reckon among the securities which he took on the estate of his debtor that of the successions which were like to fall to him.

\* L. 6, D. quæ in fraud. cred.;—v. l. 28, D. de verb. sign.;—l. 119, D. de reg. jur.;—l. 134, eod.

## SECTION I.

OF THE SEVERAL SORTS OF FRAUDS WHICH ARE DONE TO THE  
PREJUDICE OF CREDITORS.

## ART. I.

1633. *Whatever Debtors do to defraud their Creditors is revoked.*—Whatever debtors do to defeat their creditors, by alienations and other dispositions, of what nature soever, is revoked, according as the circumstances of the fact and the rules which follow may give occasion to it.<sup>a</sup>

## II.

1634. *Fraudulent Bounties.*—All the dispositions which debtors make on the score of liberality, to the prejudice of their creditors, may be revoked, whether he who receives the liberality knew of the prejudice done thereby to the creditors, or whether he was ignorant of it. For his honesty and integrity do not hinder the thing from being unjust, that he should profit by their loss. But if the donee received the bounty with an innocent intention, knowing nothing of the prejudice the creditors would suffer thereby, and if the thing that was given be no more in being, and he reaped no manner of profit from it, he would not be bound to restore a benefit from which there accrued to him no manner of advantage.<sup>b</sup>

## III.

1635. *Alienations to Fair Purchasers.*—The alienations of movables and immovables which debtors make, upon another score than that of liberality, to persons who purchase with an honest intention, and for a valuable consideration, knowing nothing of the prejudice done thereby to creditors, cannot be revoked, whatever intention of defrauding the debtor may have had. For the debtor's knavish intention ought not to cause a loss to those who deal with him in a lawful commerce, and who have no share in his fraud.<sup>c</sup>

<sup>a</sup> L. 1, § 1, *D. quæ in fr. cred.*; — § 6, *Inst. de act.* See the seventh article.

<sup>b</sup> L. 6, § 11, *D. quæ in fraud. cred.*; — l. 3, *C. de revoc. his quæ in fr. cred.*

<sup>c</sup> L. 1, *D. quæ in fraud. cred.*; — l. 10, *ead.*; — l. 6, § 8, *ead.* It is to be remarked on this article, that it does not extend to the case where the creditors have a privilege or mortgage upon the thing alienated.

## IV.

1636. *Alienations made to Purchasers who are conscious of the Fraud.* — Although the fraudulent alienation be made for a valuable consideration, such as a sale, yet if it be proved that the purchaser has been a partaker in the fraud, that he might profit by it, getting the thing upon that account at a cheaper rate, the alienation will be revoked, without any restitution of the price to the purchaser who is an accomplice in the fraud,<sup>d</sup> unless the money which he paid for it be still in being, in the hands of the debtor who sold the thing to him.<sup>e</sup>

## V.

1637. *To make a Purchaser conscious of the Fraud, he must know of the Design to defraud.* — To oblige him who purchases a thing of a debtor to make restitution of it, it is not enough that the purchaser knew that the said debtor had creditors; but he must have been privy to the design of defrauding them. For many of those who have creditors are not insolvent, and one does not become an accomplice in the fraud except by taking part in it.<sup>f</sup>

## VI.

\* 1638. *The Intention to defraud must be followed with the Effect, otherwise the Alienation cannot be revoked.* — If the intention to defraud is not attended with the effect, and the creditors suffer no real loss by it; as *if*, for example, when the creditors are suing at law for their debts, or are preparing to bring their action, the debtor satisfies them by the sale of his goods or otherwise, the alienation which had been made to their prejudice will have its effect. And if afterwards the debtor borrows money, the new creditors cannot revoke the first alienation, which was not made to their prejudice;<sup>g</sup> but if the new creditors had lent their money to pay off the old ones, and if their money was actually employed to that use, they may revoke the alienation, although it was made before they lent their money. For in this case they would exercise the rights of the first creditors, in whose place they succeeded by reason that their money was employed to pay them off, according to the rules which shall be explained in their proper place.<sup>h</sup>

<sup>d</sup> L. 7, D. *quæ in fr. cred.*\* L. 8, *cod.*<sup>e</sup> L. 10, § 2, D. *quæ in fraud. cred.*; — d. l. 10, § 4.<sup>f</sup> L. 10, § 1, D. *quæ in fraud. cred.*; — l. 15, § 6, *cod.*; — l. 1, C. *qui man. n. poss.*<sup>h</sup> See the seventh section of *Pawns and Mortgages*.



## VII.

1639. *Divers Ways of defrauding.* — All the ways by which debtors diminish fraudulently their stock of goods, to defraud their creditors, are unlawful; and whatever is done to their prejudice by such ways will be revoked. Thus, donations, sales at an under price, or for a counterfeit price, for which the debtor gives an acquittance, assignments made to third persons, fraudulent discharges, and, in general, all contracts and other deeds and dispositions made to defraud creditors, will be annulled.<sup>1</sup>

## VIII.

1640. *Other Sorts of Frauds.* — If, to defraud creditors, a debtor, colluding with his own debtor, gives up a mortgage or pawn which he had for the security of his debt;<sup>1</sup> if to extinguish a debt he furnishes his debtor with exceptions which he had no just title to, or if he refers to the debtor's oath a debt which he had sufficient evidence to prove;<sup>2</sup> if he compounds the matter by transaction with an unfair and dishonest intention, or if he gives an acquittance without payment;<sup>3</sup> if he lets himself be nonsuited in a just demand by collusion with his debtor, or if he suffers a creditor to obtain judgment against him in a suit where he had just and legal defences;<sup>4</sup> if he drops an action commenced;<sup>5</sup> if he suffers a debt to prescribe by collusion with his debtor;<sup>6</sup> and if he does or omits to do any other thing by which he causes a loss, or a voluntary diminution of his goods to the prejudice of his creditors;<sup>7</sup> whatever shall have been done by such collusion will be revoked, and the creditors will be substituted to the first rights of their debtor.<sup>8</sup>

## IX.

1641. *Another Kind of Fraud.* — If a debtor who had a term fixed for the payment of what he owed to one of his creditors, or who owed the debt only upon a certain condition which was not as yet come to pass, colluding with this creditor in order to favor him preferably to the others, pays him beforehand, the other creditors may demand from him who has received the said payment the interest from the day of payment to the time that the debt became

<sup>1</sup> L. 1, § 2, et l. 2, D. quæ in fraud. cred.; — l. 7, eod.

<sup>2</sup> L. 2, D. quæ in fr. cred.

<sup>3</sup> L. 3, eod.; — l. 9, § 5, D. de jurajur.

<sup>4</sup> L. 17, eod.; — l. 1, § 9, D. si quid in fr. patr.

<sup>5</sup> D. l. 3, § 1, D. quæ in fr. cred.

<sup>6</sup> D. § 1.

<sup>7</sup> D. § 1.

<sup>8</sup> D. l. 3, § ult. et l. 4, eod.

<sup>9</sup> L. 1, § ult. eod.

## BOOK III.

### OF THE CONSEQUENCES WHICH ADD TO ENGAGEMENTS, OR WHICH STRENGTHEN AND CORROBORATE THEM.

1650. HAVING explained the several sorts of engagements which are the subject-matter of the civil law, and which are formed either by covenant, of which we have treated in the first book, or without covenant, such as those which have been explained in the second book; it remains now, in order to finish the first part of this work, pursuant to the plan laid down in the last chapter of the *Treatise of Laws*, that we explain the consequences of engagements. And in this third book we shall treat of the consequences which add to engagements, or which strengthen and corroborate them; and in the fourth we shall examine the consequences which annul engagements, or which diminish them.

## TITLE I.

### OF PAWNS AND MORTGAGES, AND OF THE PRIVILEGES OF CREDITORS.

1651. *The Mortgage or Pawn is a Consequence of Engagements.* — The first and most frequent of all the consequences of engagements, whether they arise from covenants, or whether they are formed without covenant, is that of a *pawn or mortgage*; that is to say, the appropriation of the estate or goods of any person, for a security of their performance of the engagement they are under. The meaning and use of these two words shall be more fully explained in the first article of the first section.

1652. *Origin of Mortgages.* — Pawns or mortgages derive their origin, and that very naturally, from engagements which cannot be executed, unless the person who is engaged be seized or possessed of some estate. For the greatest force of obligations, and the most perfect integrity in those who are bound, would be all to no purpose, if they had no estate; and the security even from those who have estates would not be entire, if the mortgage did not appropriate their estates for the payment of their creditors; because, the debtors divesting themselves of their estates, either by donations or by sales or other titles, and the estate when alienated being no longer the debtor's estate, the creditors would be without remedy, if they had not the right to claim the estate which has been alienated, into whose hands soever it may have passed. And it is by the use of a mortgage that this right hath been established.

1653. We shall say nothing here of the privileges of creditors; for that shall be the subject-matter of the fifth section; neither shall we make here any other remarks on the nature of mortgages, their kinds, the things which are subject to them, the ways by which they are acquired, and what else relates to this matter. For the order and place of every one of these things will sufficiently appear by the distinction of the sections of this title.

## SECTION I.

OF THE NATURE OF A PAWN AND MORTGAGE, AND OF THE THINGS WHICH ARE CAPABLE OF BEING THUS ENGAGED OR NOT.

1654. *Difference between our Usage and the Roman Law as to Movables, in what relates to a Mortgage.* — Seeing the nature of a mortgage is to appropriate estates for the security of engagements; and that, for example, the creditor of a sum of money, secures his payment by the right of claiming the thing which is mortgaged to him, into whose hands soever it passes; it is necessary to observe one important difference between our usage and the Roman law, in what relates to the security on the movables and personal estate of debtors.

1655. By the Roman law, the mortgage had the same effect on movables as immovables, with that right of claiming them, into whose hands soever they went. But the inconveniences of sub-

really due,<sup>1</sup> and even the principal sum, if it was a debt that was only due upon a condition not yet come to pass. And, in this case, care would be taken to provide for the security of those to whom the money ought to return, whether it be the creditor, if the condition is fulfilled, or those who ought to receive the money, if the condition is not fulfilled.

## X.

1642. *Other Frauds.* If a debtor obliges himself, to the prejudice of his creditors, for things which he does not owe, if he gives money or any other thing to persons to whom he owed nothing, or if he commits other frauds of the like nature, the whole will be revoked by his creditors.<sup>2</sup>

## XI.

1643. *A Dowry settled to defraud Creditors.*—We must not reckon, in the number of fraudulent liberalities which may be revoked, that which is given on the score of dowry or marriage portion, whether it be by the father of the woman or by other persons, when the husband is ignorant of the fraud. For although the dowry may be given fraudulently by those who endow the wife, yet the husband who receives the dowry on a valuable consideration, and who without the said dowry would not have engaged in the state of matrimony, ought not to lose it.<sup>3</sup> But if the husband was a partaker in the fraud, he may be made accountable for what concerns his own act, according to the circumstances.<sup>4</sup>

<sup>1</sup> L. 10, § 12, *D. quæ in fr. cred.*; — l. 17, *in f. cod.*

<sup>2</sup> L. 3, *D. quæ in fraud. cred.*

<sup>3</sup> L. 25, § 1, *in fine, D. quæ in fraud. cred.*

<sup>4</sup> *D. § 1*; — l. 14, *in fine, cod.*; — l. 10, § 14, *cod.*; — l. 2, *C. de reyp. his quæ in fraud. cred. alien. sunt.* By the ordinance of Francis I., of the 8th of June, 1532, and of Charles IX., in January, 1563, the settlements of dowries or marriage portions could not exceed ten thousand livres. Which, among other motives, might have that of preventing frauds in marriage settlements. But these ordinances are of no manner of use.

We must observe on this article the difference between the condition of a husband to whom a portion is given in marriage with his wife, without his being concerned in any fraud whatsoever, and who receives what has been promised him for a dowry from the person who made the settlement; although the said person may have done it with intention to defraud his creditors, and the condition of a husband who has been partaker in the fraud that was done to the creditors by giving him with his wife an excessive dowry. For this husband, being an accomplice in the fraud, might be made answerable for it, according to the circumstances. But the other husband, in the first case mentioned, would have a right to receive the dowry which had been promised him, in the same manner as

## XII.

1644. *He who receives what is due to him commits no Fraud.* — The creditor who receives from his debtor that which is due to him commits no fraud, but does himself justice by taking care of his own interest, as it is lawful for him to do. And although his debtor be found insolvent, and because of the said payment there does not remain enough to satisfy the other creditors, or there even remains nothing at all for them, he is not bound to restore what he has received for his own payment; but the other creditors ought to blame themselves for not having been as watchful of their interest as he has been of his who has got payment.<sup>a</sup>

## XIII.

1645. *Exception to the foregoing Article.* — If, after the seizure of the goods of a debtor, or after a debtor has assigned over his goods for the satisfaction of his creditors, one of them receives payment of his debt, either out of the stock of the goods that have been seized, or out of what has been made over to the creditors, he shall be obliged to share with the other creditors what he has received; because, in that case, he takes to himself that which belongs in common to all the creditors.<sup>a</sup> But this is not to be understood of what one who has seized on the movables of his debtor may have received, by the means of his diligence, before the other creditors have entered their actions.<sup>b</sup>

every creditor may receive what is due to him, although there should not remain enough to satisfy the other creditors.

We must likewise distinguish, upon this article, between the dowry which a woman settles herself on her marriage, and that which her father or other persons may settle upon her. In the first case, that which a woman herself settles on her marriage out of her own estate can be of no prejudice to her creditors; for they will have their action against the husband for what he shall have received on the score of the dowry, he being in so much a debtor to his wife. But in the second case, the creditors of those who have settled the dowry have no action against the husband, who has received nothing but what was due to him on account of his wife's portion.

<sup>a</sup> L. 6, § 6, *D. quæ in fr. cred.*; — d. l. 6, § 7; — l. 24, *eod.*; — d. l. 24, *in fine*; — l. 21 *D. de pecul.* See the following article.

<sup>b</sup> L. 6, § 7, *D. quæ in fraud. cred.*

<sup>c</sup> L. 12, *D. de reb. auth. jud. poss.*; — l. 10, § 16, *D. quæ in fraud. cred.*

## SECTION II.

OF THE ENGAGEMENTS OF THOSE WHO COMMIT THESE FRAUDS, OR  
WHO PARTAKE IN THEM.

## ART. I.

1646. *Engagements which follow from Frauds done to Creditors.* — He who shall have partaken in a fraud done to creditors shall be bound to restore whatever he has received by such means, together with the fruits or other profits, and the interest, if it is money, to be reckoned from the day on which he received it. And all things shall be restored to the same condition in which they were before the fraud.\*

## II.

1647. *Accomplices of the Frauds.* — All those who contribute to frauds done by debtors to their creditors, whether they reap profit by them, or whether they lend barely their names, are bound to repair the wrong they have done. Thus, those who accept of fraudulent assignments to what is due to the debtor are bound to deliver up to the creditors the titles of the said credits, together with their assignments, or that which they have received of the debt themselves, or caused the debtor to receive, who borrowed their name.<sup>b</sup>

## III.

1648. *Punishment of the Debtor who defrauds his Creditors.* — ~~The~~ debtor who has defrauded his creditors is not only bound to repair, as much as can be done out of his estate, the effect of the fraud, but he ought likewise to be condemned to such penalties, as his unfair dealing may deserve, according to the circumstances.<sup>c</sup>

## IV.

1649. *When a Tutor or Guardian partakes in a Fraud done to Creditors.* — If a tutor or guardian becomes partaker in any fraud

\* L. 10, §§ 19 et 20, *D. quæ infraud. cred.*; — d. l. 10, § 22; — l. 38, § 4, *D. de usur.*

<sup>b</sup> L. 14, *D. quæ in fr. cred.* See the following article.

<sup>c</sup> L. ult. § ult. *D. quæ in fr. cred.*; — l. 1, *ead.* See the ordinance of Orleans, art. 143, that of Blois, art. 205, and others which inflict penalties on those who are guilty of fraudulent bankruptcies.

which a debtor commits against his creditors, by favoring in that quality the unfair dealing of the said debtor, by any act which relates to the person whom the said tutor or guardian has under his charge; he shall be bound personally for the loss which his fraud may have caused. And the minor, whose estate the tutor or guardian had the administration of, shall likewise be bound to repair the fraud, although he knew nothing of it, but he will be liable only for so much as he shall have profited thereby.<sup>d</sup>

<sup>d</sup> *L. 10, § 5, D. quæ in fr. cred.;—d. l. § 11.* Although these laws make no mention of what the tutor may be obliged to bear in his own name for his own proper act, yet he is most certainly liable to the loss which his deceit shall have occasioned, as are all those who do harm by their fraudulent dealings. *L. 1, § 1, D. de dolo.*

jecting to this right of prosecution movables, which are so liable to change masters, have induced our lawgivers to settle the law in relation to this matter otherwise in this kingdom. And the rule with us is, that the mortgage or pawn upon a movable thing lasts no longer than whilst the thing is in the custody of the person who is bound, or than he who has it for his security is in possession of it. But if the debtor makes it to pass into other hands, either by alienating it or pawning it, the creditor cannot any longer lay claim to it. And this rule is expressed in these words, that *Movables have no sequel by a mortgage.*

1656. The usage, then, in France, as to movables is, that creditors exercise their right to them two ways. One is, when the movable is in the custody of the creditor, who has it in his possession, and holds it in pawn. And the other is, when the movable is in the custody of the debtor, or of other persons who keep it in his name; such as a depositary, or one who has borrowed it, or another creditor who has a thing in pawn, the value of which exceeds that of his debt. In the first case the creditor may cause the thing to be sold, if the debtor consents to it; or upon his refusal, the creditor may have an order from the judge for selling it; in order to pay himself out of the price which it yields, and that preferably to all other creditors, even although they be prior in time, but not to the prejudice of a creditor who has a privilege on the same pawn.\* In the second case the creditor may seize on and expose to sale a movable thing belonging to his debtor, if he has a mortgage upon his estate, or leave from the judge to attach his goods. And if other creditors concur with him by other attachments or actions, he shall be preferred to them, if he has the first seizure; unless it be that all the goods of the debtor are not sufficient to satisfy all his creditors. For in this case of insolvency, the first who seizes or attaches the goods is not preferred, and there is no preference in favor of any of the creditors, except such as have some privilege; and all the other creditors share in proportion to their claims, as shall be explained in the fifth title of the fourth book. Whereas, in immovables, the creditors are preferred the one to the other, according to the priority of their mortgages; which proceeds from the difference which our usage puts between immovables, which are capable of a mortgage, and movables, in which the mortgage has no sequel.

\* See the remark on the fourth article of the fifth section.



And when the movable thing is neither in the custody of the creditor nor of the debtor, nor of any other in his name, the debtor having alienated it, the creditor then has no longer any right to it, except in the case which shall be observed on the fourth article of the fifth section.

### ARTICLE I.

1657. *Signification of the Words "Pawn" and "Mortgage."*—The word *mortgage* signifies commonly the same thing as the word *pawn*; that is, the appropriation of the thing given for the security of an engagement; and these two words are used indifferently in the same sense. But the word *pawn* is more properly applied to movable things, which are put into the hands and keeping of the creditor; and the word *mortgage* signifies properly the right acquired by the creditor upon the immovables which are appropriated to him by his debtor, although he be not put into possession of them.<sup>a</sup>

### II.

1658. *Mortgages are for the Security of Obligations.*—The mortgage being established for the security of the several sorts of obligations and engagements, there is no engagement in which one may not give a mortgage for the security of the creditor. Thus, those who borrow, who sell or buy, who let or take to hire, or who enter into other engagements, may add thereto the mortgage of their estate, for the greater security of the person to whom they oblige themselves.<sup>b</sup>

### III.

1659. *Mortgage for a Conditional Debt.*—One may mortgage his estate, not only for engagements which have an immediate and certain effect; such as an obligation for money lent, a sale, the contract of letting and hiring, and others of the like nature, where the engagement is formed immediately, although there be a term fixed for the payment; but also for engagements the effect of which depends on a condition or other event, which may not come to pass. Thus, the engagements formed by a contract of marriage imply always the condition, if the marriage is accomplished; but the

<sup>a</sup> § 7, *Inst. de act.*; — l. 5, § 1, *D. de pign. et hypoth.*; — l. 238, § 2, *D. de verb. signif.*; — l. 9, § 2, *D. de pign. act.*; — l. 1, *cod.*

<sup>b</sup> l. 5, *D. de pign. et hyp.*; — l. 9, § 1, *D. de pign. act.*

mortgage is acquired from the day of the contract; both to the husband on the estate of those who contract for the wife's portion, and to the wife on the estate of the husband, that she may recover her dowry when there shall be occasion for it. And as a mortgage may be given for a conditional debt, so likewise a mortgage may be given upon condition for a debt which is pure and simple, so as that the mortgage may not have its effect till the condition is fulfilled.\*

## IV.

1660. *A Mortgage for a Loan that is to be contracted has no Effect.* — If a person, foreseeing that in a short time he may have occasion to borrow money, obliges himself beforehand for the sum which he shall afterwards borrow, and mortgages his estate for this loan that is to be contracted; the mortgage stipulated on such account will be without effect. For a mortgage is only an accessory to an engagement that is already formed; and till it be formed there is no loan, for the person may perhaps not borrow money at all. And besides, if a mortgage could be acquired in this manner, it would be easy by an obligation of this nature, made to a person whose name is borrowed for that purpose, to defraud the creditors from whom one would afterwards borrow.<sup>d</sup>

## V.

1661. *Mortgage on an Estate to come.* — Those who bind themselves by any engagement whatsoever may, for the security of their performance of the engagement on their part, appropriate and mortgage, not only the estate they are masters of at the time of contracting, but likewise all the estate which they shall be afterwards seized or possessed of. And this mortgage extends to all the things which they shall afterwards acquire, that are capable of

\* L. 5, *D. de pign. et hyp.*; — l. 13, § 1, *D. qui pot.*; — l. 1, *D. qui pot.*; — d. l. § 1.

See, concerning the conditional mortgage, the twentieth article of this section and the seventeenth article of the third section. L. 13, § 5, *D. de pignor.* See the following article.

<sup>d</sup> L. 4, *D. quas res pign. vel hyp.*; — l. 11, *D. qui potior*; — *Inst. quib. mod. re contr. obli.* See the latter part of the text cited on the foregoing article, taken out of the first law, *D. qui potior*. If the obligation was made for a loan already contracted, it would carry in it the proof of the delivery of the money, although the creditor had not delivered it till some time after the date of the obligation, and yet the mortgage would nevertheless have its effect. Every day obligations are given for sums of money that are not to be delivered till some time after, and in another place; but the engagement is already formed, and the delivery of the money may be retarded by some obstacle without any unfair dealing.

being mortgaged, by what title soever it be that they acquire them, and even to those which are not in being when the obligation is contracted; so that the fruits which shall grow upon the lands will be comprehended in the mortgage of an estate to come.\*

## VI.

1662. *How a Mortgage extends to the Whole Estate, or is restrained to Part of the Estate.*—Although the obligation of the mortgage does not make express mention of the estate to come, or that the person contracting mortgages his estate without the addition of the word *all*; yet the obligation will take in both the estate in possession, and also that in reversion. But if the mortgage be only particular, and restrained to certain lands and tenements, it will have no effect upon the others.<sup>f</sup>

## VII.

1663. *Accessories of the Mortgage.*—Although the mortgage be restrained to certain things, yet it will nevertheless extend to all that shall arise or proceed from that thing which is mortgaged, or that shall augment it and make part of it. Thus, the fruits which grow on the lands that are mortgaged are subject to the mortgage while they continue unseparated from the ground.<sup>g</sup> Thus, when a stud of horses, a herd of cattle, or a flock of sheep is put in pawn into the creditor's hands, the foals, the lambs, and other beasts which they bring forth, and which augment their number, are likewise engaged for the creditor's security. And if the whole herd or flock be entirely changed, the heads which have renewed it are engaged in the same manner as the old stock.<sup>h</sup> Thus, when the bounds of a piece of ground that is mortgaged happen to be enlarged by that which the course of a river may add to it, the

\* L. 1, D. de pign. et hyp.; — l. 15, eod. As to the things which are not susceptible of a mortgage, see the twenty-fourth and following articles.

<sup>f</sup> L. 15, § 1, D. de pign. et hyp.; — l. ult. C. quæ res pign. obl.; — d. l. ult. in f. When a debtor who has mortgaged all his estate happens to make a new purchase, the mortgage which his creditors have on the thing newly purchased commences only from the day that the purchase was made, and not from the day of their mortgage on the rest of the estate. For, otherwise, there would be wrong done to the creditors of the person of whom the debtor purchased the said land or tenement; the alienation of which could not be of any prejudice to their mortgages. But among the creditors of this purchaser, the most ancient will be preferred before the others, on the land or tenement that is acquired after their mortgages.

<sup>g</sup> See the fourth article of this section.

<sup>h</sup> L. 13, D. de pign.; — l. 29, § 1, eod.

mortgage extends to that which has augmented the ground.<sup>1</sup> Thus, a house that is built on a ground which is mortgaged is subject likewise to the mortgage. And if, on the contrary, a house be mortgaged, and it perishes by fire, or falls through decay, the mortgage will subsist on the ground where the house stood.<sup>1</sup> Thus, when a debtor mortgages a piece of ground of which he had only the bare property, another enjoying the usufruct of it, when the said right to the usufruct comes to be extinct, the mortgage will comprehend the ground together with the fruits.<sup>2</sup>

## VIII.

1664. *The Proceed of the Thing mortgaged, and which is separated from it, is not subject to the Mortgage.*—All that has been said in the preceding article is to be understood only of the augmentations or accessories, which are a part of the thing that is mortgaged, and does not extend to that which is the proceed of it, but is separated from it, and changes its nature. For, as for example, if one takes timber out of a forest that is mortgaged, to employ it in a building, or in making a ship, the mortgage which one has on the forest will not extend to this timber that has been taken out of it.<sup>2</sup>

## IX.

1665. *Of a Building raised on a Ground that is mortgaged.*—If a third possessor of a ground that is subject to a mortgage builds upon it, the mortgage that is upon the ground will extend likewise

<sup>1</sup> L. 16, *ead.*; — l. 18, § 1, *D. de pign. act.*

<sup>2</sup> L. 21, *D. de pign. act.*; — v. l. 29, § 2, *D. de pign. et hyp.*

§, § 1, *D. de pign. act.* Although living creatures be of the number of movable effects, which by our usage are not capable of being mortgaged, yet they may be put in pawn into the hands of a creditor, to be as a security to him for a legacy, for a rent, or other debt. And it would be the same thing if a herd of cattle had been bought with the money of a creditor, to whom it would be appropriated as a security for his money. For that creditor would retain his preference on the said herd of cattle as long as it continued in the possession of the proprietor, his debtor. See the remark on the fifth article of the fifth section, and that which has been said in the preamble of this section, and the remark on the fourth article of the fifth section.

<sup>2</sup> L. 18, § 3, *D. de pign. act.* Our usage, according to which movables have no sequel by a mortgage, furnishes us with another reason why these kinds of changes make the mortgage to cease on that which becomes movable, and which is no longer in the possession of the debtor or creditor. Thus, the timber that is separated from the forest, and the materials of a house that is gone to ruin, being alienated by the debtor, the purchaser possesses them free from the mortgage which a creditor had on the said forest or on the said house.

to the building; for the building is an accessory which follows the nature of the ground, and which belongs, likewise, to the proprietor of the ground. But the creditor who exercises his right of mortgage on the ground that is built upon, cannot have it adjudged to him but with the charge of reimbursing the said possessor who has raised the building for the expenses he has laid out upon it, provided that the expenses do not exceed the value of the building; for if they do exceed it, it would not be just that the creditor should be obliged to refund them.\* But whether the building be worth more than what it cost, or worth as much, or less, it will be free for the said possessor to retain the ground and the building, if he pays the debt.

## X.

1666. *When a House that is mortgaged is burnt down and rebuilt by the Debtor.* — If a house that is mortgaged happens to be burnt down, and is rebuilt by the debtor, the creditor will have the same mortgage both upon the ground and the new house, and that with much more reason than in the case of the foregoing article.

## XI.

1667. *Of the Change of the Face of the Land or Tenement that is mortgaged.* — The other changes which may be made by any possessor of a ground that is subject to a mortgage do not extinguish it, but the mortgage subsists upon the ground, whether it be made worse or better, and in the condition that it happens to be. Thus, for example, if a house is turned into a garden, a field into a vineyard, a wood into meadow-ground, the mortgage continues upon the new face that is given to the land or tenement.<sup>1</sup>

## XII.

1668. *Of that which is purchased with the Money that arises from the Land or Tenement that is mortgaged.* — If a debtor who had not mortgaged all his estate, but only one piece of land, lays out the money arising from the fruits of the said land that is mortgaged on the purchase of a new estate, this new purchase, although proceeding from the fruits which were subject to the mortgage,

\* L. 29, § 2, D. de pign. et hyp.; — l. 7, § 12, D. de acquir. rer. dom.; — § 29, Inst. de rer. div.

<sup>1</sup> L. ult. D. de pign. et hyp.

<sup>2</sup> L. 16, § 2, D. de pign. et hyp.

will not be subject to it; no more than an estate that is purchased with the money or other thing which the creditor had in pawn; for the mortgage may very well extend to the accessories of the thing that is mortgaged, according to the rule explained in the seventh article; but it does not pass from one thing to another which was not included in the deed of mortgage.

## XIII.

1669. *Of an Estate that is mortgaged at the same Time to two Creditors.* — If one and the same estate be mortgaged to two creditors for different causes at the same time, without distinguishing one portion for one of the creditors and another for the other, each of them shall have his mortgage upon the whole estate for his whole debt. And if the whole estate be not sufficient for both the creditors together, their right will be divided, not by moieties, but in proportion to the difference of the debts owing to them. For each creditor having his mortgage upon the whole estate for his whole debt, their concurrence divides their rights upon the same foot. And if, for example, there be ten thousand livres due to one of the creditors, and five thousand to the other, and the estate which is mortgaged to them be not worth fifteen thousand livres, the one creditor will have two thirds for his mortgage, and the other one third.\*

## XIV.

1670. *In an Equality of Mortgage the Possessor is preferred.* — If, in the case of two creditors to whom the same thing is mort-

\* L. 3, C. in quib. caus. pign.; — l. 7, in fine, D. qui pot. If a debtor acquires by an exchange another land or tenement in lieu of that which he had mortgaged, would this exchange of the said land or tenement make the mortgage to pass to the land or tenement which the debtor has got in exchange? If the mortgage was limited by a covenant to the land or tenement given away in exchange by the debtor, it would seem that the mortgage ought not to change, no more than it ought to extend to both the lands or tenements. For besides that it is the nature of the mortgage to affect only the land or tenement that is engaged, and to follow it, the change which should discharge from the mortgage the land or tenement given away in exchange by the debtor, and which should charge with it the land or tenement which he receives in exchange, would be attended with inconveniences which would cause injustice to the creditors of the persons who make the exchange, not only by the inequality which might happen in the value of the two lands or tenements, but because of other consequences, of which it is easy to judge without further explication. But if this debtor had mortgaged all his estate, present and to come, the mortgage would extend to both the lands or tenements.

\* L. 16, § 8, D. de pign. et hyp.; — l. 10, eod.; — l. 20, § 1, D. de pign. act. See the three following articles.

gaged for the whole at the same time, one of them is put into possession, he shall be preferred. For the possession distinguishes their right in favor of him who, besides the equality of the title, has the advantage of being in possession. But if one part of the thing is mortgaged to one creditor and the rest to another, each shall have his separate right on his own portion.

## XV.

1671. *Of a Mortgage upon the undivided Portion of one of the Cohairs to an Estate.*—If an estate belonging in common, without any division or partition, to two or more persons, such as copartners, coheirs, or others, one of them has mortgaged to his creditor either all his estate or the right which he had to that estate, this creditor will have his mortgage upon the undivided portion of his debtor, as long as the estate shall remain in common. But after the partition, the right of this debtor being limited to the portion that has fallen to his lot, the mortgage of his creditor will be also limited to the same. For, although before the partition the whole estate was subject to the mortgage for the undivided portion of this debtor, and though a right which is acquired cannot be diminished; yet, seeing the debtor had not a simple and immutable right of enjoying his share of the estate always undivided, but that his right implied the condition of a liberty to all the proprietors to come to a partition in order to assign to every one a portion that might be wholly and entirely their own, the mortgage, which was only an accessory to the debtor's right, implied likewise the same condition, and affected only that which should fall to the debtor's share, the portions of the others remaining free to them. But if in the partition there was any fraud committed, the creditor might procure a redress of what has been done to his prejudice.\*

*L. 128, D. de reg. jur.; — l. 10, D. de pign. et hyp.; — l. 1, § 1, D. de sol. interdict.* See the thirteenth article of the second section of the *Contract of Sale*, and the third article of the third section of this title.

\* *Id. l.* See the foregoing article.

*L. 6, § 8, D. comm. divid.; — l. 7, § ult. D. quib. mod. pign. vel hyp. solv. et red. § 9, D. qui peller.* We have added to the rule that is taken from the texts cited upon this article, that after the partition the mortgage is restrained to the portion that falls to the share of the debtor. For this is the usage with us; and it is what equity demands; as appears from the reasons explained in the article. So that we do not follow the disposition of these texts, no more than another decision of the like nature in the thirty-first law *D. de usu et usufr. et red.*, which determines that the usufructuary of an undivided estate

## XVI.

1672. *The Creditor's Mortgage on the Lands of a Person deceased extends to all the Portions of the said Lands, even after they are divided among the Coheirs.* — The partitions which coheirs make among themselves of the lands or tenements of a succession make no change in the mortgage which the creditors of the deceased had on the said lands or tenements; and each land or tenement remains engaged for the whole debt. Thus, the coheir who possesses one land or tenement of the succession, having paid his share of the debt, cannot hinder his land or tenement from being seized on for the portions of the other coheirs, no more than if that portion of the debt had been paid by the deceased himself. For the mortgage affects every particular land or tenement of the succession, and every part of the said land or tenement for the whole debt. And this heir will only have his recourse against his coheirs for their portions.

retains his right after the partition among the proprietors, and that he has his usufruct entire upon the portions of all the proprietors. These laws are founded upon this nicely, that the usufructuary or the mortgagee, having their right entire and undivided upon the whole estate, the partition ought not to take away their right. But this right of theirs is in effect no other than what has been explained in the article. And likewise this nicely would be attended with an infinite number of inconveniences, if persons interested in a partition, whether they be copartners or others, after they have made a partition without fraud, might be disturbed by the creditors of one of their number, and all their portions might be seized and sold for the debt of one person alone. To which may be applied the last words of the only law, *Cod. si commun. res pign. data sit*: — Unde intelligis contractum ejus nullum præjudicium dominio vestro facere potuisse.

The difficulty would still be much greater in the case of a partition of a succession consisting of movable effects, and of one only land or tenement, which it would be either impossible or very inconvenient to divide into shares, or even although there were more lands or tenements than one in the succession, which the heirs or executors would be obliged for their conveniency to divide, so that some of them should have only for their shares movable effects, and but little, or perhaps nothing at all, in the lands and tenements. For, in this case, the creditors of the coheir or coexecutor who should chance to have in his lot either little or nothing at all of the lands and tenements would find themselves disappointed in the hopes they may have entertained of having a mortgage upon the lands or tenements that made part of the succession. But these creditors ought to have a watchful eye before the partition, both over the movables and immovables, that nothing be done to their prejudice. For if the partition were made without fraud, they might be told that their security was only upon what might fall to the share of their debtor; and if, for example, that debtor had wasted and dissipated the movable effects which fell to his lot, it would not be just that the shares of the others should go to the payment of his debts; on which account, *l. 1. § 1. de pign. act. s. et l. 2. C. si unus ex plur. hered. credit.*; — *l. 18. C. de distr. pign.*; — *l. 1. C. de h. pign.* It is upon this rule, that this common maxim is founded, that the heirs are bound by virtue of the mortgage for the whole debt, although they are bound personally only every one for the portion of the inheritance that falls to his



## XVII.

1673. *All the Coheirs or Coexecutors of a deceased Creditor have their Security on what was mortgaged to the said Creditor.* — If one of several coheirs or coexecutors of a deceased creditor receives his portion of the debt from the debtor, the mortgage nevertheless remains entire to the other coheirs or coexecutors for the security of their portions upon all that the said debtor had mortgaged to the said deceased creditor.\*

## XVIII.

1674. *The Mortgage is undivided.* — The mortgage makes an undivided appropriation of all that is mortgaged, for the security of all that is due; and in such a manner, that, for example, if two lands or tenements be mortgaged for one and the same sum, the mortgage hath not this effect, that each land or tenement be bound only for a part of the debt; but, of what value soever they be, they are, both the one and the other, bound for the whole sum; and if one of the said lands or tenements happens to perish, the mortgage remains entire for the whole debt upon the land or tenement which is still in being.<sup>a</sup> And likewise, although the debtor pay a half or other share of the debt, the two lands or tenements continue to be bound for what remains unpaid. For it is the nature of a mortgage, that all that is mortgaged serves as a security for the whole debt, and even all the parts of each land or tenement that is mortgaged are all of them bound for all that is due.<sup>b</sup>

## XIX.

1675. *What may not be sold cannot be mortgaged.* — We can only pawn and mortgage such things as may be sold; and what may not be sold cannot likewise be mortgaged. For the use and benefit of the mortgage consists only in the alienation that may be made of the thing mortgaged, for the payment of what is due upon that security.<sup>c</sup>

share. For the personal action is divided among the persons of the heirs or executors, as shall be explained in its proper place. But the mortgage subsists undivided, and binds equally all the lands and tenements that are subject to it, and all the parts of each land or tenement.

<sup>a</sup> L. 11, § 4, *D. de pign. act.*

<sup>b</sup> L. 19, *D. de pign.*

<sup>c</sup> L. 6, *C. de distr. pign.*; — l. 1, *C. de luit. pign.*; — l. 65, *D. de soci.*

<sup>d</sup> L. 9, § 1, *D. de pign. et hypoth.*; — l. 1, § 2, *D. quas res pign. vel hyp. dat. ob. non possunt*; — v. l. ult. *C. de reb. al. non alien.* We have seen, in the eighth section of the Con-

## XX.

1676. *A Mortgage given by a Debtor on a Land or Tenement that is not his own.* — As one may sell a thing which belongs to another person,<sup>a</sup> so likewise may he mortgage it; whether it be that the owner consents to the mortgage, or that he ratifies it;<sup>b</sup> or that the mortgage be conditional, to have its effect when he who engages a thing that is not his own shall become master of it.<sup>c</sup> But if the debtor pawns or mortgages a thing as his own, which he knows does not belong to him, he is guilty of cozenage, which knavish practice the Romans distinguished by the name of *stellionatus*, and discouraged by severe penalties.<sup>d</sup> However, if afterwards he becomes master of the thing, the mortgage will then have its effect;<sup>e</sup> but without prejudice to the mortgages of the creditors of the person to whom the thing belonged.

## XXI.

1677. *Cozenage or Stellionate in Mortgaging.* — He who, having mortgaged a certain land or tenement, specified and particularly named, to one creditor, engages it afterwards to another, without giving him notice of the first mortgage, commits an infidelity which is called by the name of *stellionate*. And if this second creditor be a loser thereby, the debtor not having wherewithal to satisfy all his creditors, he ought to be punished for this his knavish dealing, according as the act may deserve; and especially if he had declared to the second creditor, that the land or tenement which he mortgaged to him was not engaged to others; for in this case the knavery would be the greater. And even although the debtor should have goods enough besides for the satisfaction of his creditors, yet he would be answerable for the consequences. And if, for example, that land or tenement had been given to the second creditor for assigning a rent, the debtor might be constrained by reason of that fraud to redeem the rent, or he might be otherwise punished, according to the circumstances. But the crime of stellionate is not

trict of *Sale* what are the things which may not be sold. But there are other things which one cannot mortgage, although they may be sold. See hereafter the twenty-fourth and following articles of this section.

<sup>a</sup> See the thirteenth article of the fourth section of the *Contract of Sale*.

<sup>b</sup> *L. 20, D. de pign. act.*

<sup>c</sup> *L. 16, § 7, D. de pign. et hyp.*

<sup>d</sup> *L. 38, § 1, D. de pign. act.*

<sup>e</sup> *L. 41, cod.;* — *L. 5, C. si alien. res pign. dat. sit.* See the twenty-first article of the third section.

imputed to him who, having once mortgaged his whole estate, does afterwards mortgage again either all his estate in general, or some part of it in particular; neither is that crime imputed to him who mortgages the same land or tenement to several creditors, whose credits, when they are all put together, do not exceed the value of the land or tenement that is mortgaged.<sup>1</sup>

## XXII.

1678. *How Tutors, Guardians, or Factors may mortgage the Estates of Persons committed to their Care.* — Tutors, guardians, factors, or agents appointed by letter of attorney, and others who have power, either by their offices or by virtue of some order, to borrow, and to pawn or mortgage the estates of those whose affairs are committed to their care, may mortgage the said estates, according to the power which they have by virtue of their offices, or of the orders which they have from the persons for whom they act. But if they are the estates of minors or of some community, the engagement, and the mortgage, which is a consequence of it, have not their effect, unless the obligation has turned to their advantage, and unless the formalities prescribed in such contracts have been observed.<sup>1</sup>

## XXIII.

1679. *Mortgage of Things Incorporeal.* — One may pawn and mortgage, not only corporeal things, that is, such things as may be felt and touched, but also things incorporeal, such as debts, actions, and other rights; and the effects of this sort are comprehended in the general mortgage, although they be not particularly mentioned. Thus, the creditor may exercise the right which he acquires by the mortgage of all his debtor's estate as much upon these sorts of rights as upon the other effects, and may seize or attach in the hands of the persons that are indebted to his debtor what they owe him, to the value of what is owing by the debtor to this creditor who has the mortgage.<sup>m</sup>

<sup>1</sup> L. 36, § 1, *D. pign. act.*; — l. 1, *C. de crim. stell.*; — l. 36, in f. *D. de pign. act.*

<sup>1</sup> L. 3, *C. si alien. res pign. d. s.*; — l. 1, *cod.*; — l. 11, *D. de pign.*; — v. l. 27, *D. de rei cred.*

<sup>m</sup> L. 4, *C. quæ res pign. obl. poss.*; — l. 5, *C. de exec. rei jud.*; — l. 1, *C. de prest. pign.*; — l. 18, *D. de pign. act.* It is to be observed on this article, that there are rights which are of the nature of immovables, such as rents; and that there are others of the nature of movables, as an obligation for money lent, and other personal debts. Rents are so far capable of being mortgaged, that the creditor retains his right on them although they should pass

## XXIV.

1680. *Things which cannot be mortgaged.* — The general mortgage, in what terms soever it be conceived, does not extend to things which humanity forbids us to strip our debtors of, and which consequently ought not to be comprehended in the mortgage. Thus, a creditor cannot seize or take in pawn the necessary wearing-apparel of his debtor, his bed, or his other movables and utensils that are of the like necessity to him. Neither can the debtors give in pledge such things specially and by name. For the creditor could not stipulate such an engagement, without transgressing the rules of equity and good manners.<sup>a</sup>

## XXV.

1681. *Things necessary for the Tillage of the Ground cannot be put in Pawn.* — Beasts belonging to the plough, ploughs, and other things necessary for tilling and cultivating the ground, are not capable of being mortgaged or pawned, and cannot be seized on by the creditor; not only because of the presumption that it was not the intention of the debtor and creditor to strip the debtor of things destined to so necessary a use, but likewise because of the prejudice which the public might suffer from such an interruption of the agriculture.<sup>o</sup>

## XXVI.

1682. *Things which are not in Commerce cannot be pawned or mortgaged.* — Things which do not enter into commerce, and which cannot be sold, such as things belonging to the public,

~~into other hands.~~ But obligations and other personal debts are of the nature of movables, and cannot be seized by the creditor when they are out of the debtor's possession. For although the creditor might cause them to be seized whilst they belong to the debtor, yet he cannot prosecute them after the debtor has assigned them over to another person, and the said assignment has been intimated to the person who is indebted to this debtor, or he has accepted of the assignment. Offices are reckoned to be in the number of immovables, and are capable of being mortgaged. See the edict of February, 1683. See, concerning the seizure of movable effects, the end of the preamble of this section. See, as to things corporeal and incorporeal, the third article of the second section of the title of *Things*.

<sup>a</sup> *Ll. 6 et 7, D. de pign. et hypoth.* — l. 1, *C. quæ res pign. obl. poss. vel non.* See *Exod. xxii. 26*; — *Deut. xxiv. 6, 17*; — *Job xxiv. 3.*

See, upon this and the following articles, the fourteenth, fifteenth, and sixteenth articles of the thirty-third title of the ordinance of the month of April, 1667, and that of *Orléans*, art. 28, that of *Blois*, art. 57, the edict of the 16th of March, 1595, and other regulations.

<sup>o</sup> *L. 7, C. quæ res pign. obl. poss. v. n.*; — l. 8, *cod.*

things sacred, cannot be pawned or mortgaged, while they remain destined to the said uses.<sup>p</sup>

## XXVII.

1683. *The Benevolence of the Prince, and the Pay of Officers and Soldiers.* — The benevolence of the prince, the subsistence and pay of officers and soldiers, are of the number of those things which cannot be distrained. For it is for the public good that such money should not be diverted from the use to which it was appropriated, for the necessary service of the prince and of the country.<sup>q</sup>

## XXVIII.

1684. *The Mortgage called Antichresis.* — The mortgage may be settled two different ways. One is, when the debtor mortgages houses or lands, for the security of what he owes, but still keeps possession of them himself. The other is, when the debtor puts his creditor into possession of the houses or lands which he mortgages to him, allowing the creditor to reap the fruits and profits of them as a compensation for the legal interest which the debtor is obliged to pay. And this last sort of mortgage is called in the Roman law *antichresis*. Thus, for example, if a father-in-law, who owes his son-in-law the portion which he promised with his daughter, gives him houses or lands to enjoy, that he may reap the profits and fruits of them in lieu of the interest of the marriage portion; this is such a mortgage as the Romans called *antichresis*. And this contract gives the creditor, over and above his right of mortgage, a right also to enjoy the fruits and profits.<sup>r</sup>

<sup>p</sup> L. 1, § 2, *D. quæ res pign.*; — l. 21, *C. de sacr. eccles.*

<sup>q</sup> L. 4, *C. de rei judic.*; — l. 5, *C. quæ res pign. obl. p. v. n.*; — l. ult. *C. de pign.*; — *Nbv.* 53, c. 5.

<sup>r</sup> L. 11, § 1, *D. de pign. et hyp.* See the fourth article of the fourth section. We give here, for an example of that sort of mortgage called *antichresis*, the mortgage of lands or houses for a marriage portion, because, the interest of the marriage portion being due to the husband, this covenant hath nothing unlawful in its nature. But the *antichresis* is for the interest of money lent, which was allowed by the Roman law, as likewise was usury, is unlawful according to our usage, which punishes usury, and the contracts which palliate it under the color of other covenants. See the fourth article of the fourth section. As to usury, see the preamble to the title of *Loan*, and the end of the preamble to the title of the *Vices of Covenants*.

XXIX.

1685. *The Creditor who has a Right to the Issues and Profits may farm them out.* — The creditor who has a right to the issues and profits of the lands which are mortgaged to him may farm them out.\*

XXX.

1686. *When the Debtor borrows his own Goods that he has laid in Pawn.* — When the creditor is put into possession of the thing, movable or immovable, that is given him in pledge, he has a right to keep it till he is paid what is owing to him; and the debtor cannot turn the creditor out of possession, nor make use of his own thing, without the consent of his creditor. As if, for example, the thing given in pawn be a movable thing, which the creditor is willing to let his debtor have the use of for a time, it will be a kind of loan, which will give the creditor a right to take possession of it again, the debtor's possession during the time that he uses his own thing being only precarious.†

XXXI.

1687. *If the Pawn be not sufficient to pay the Debt, the Debtor will still be accountable for the Surplus.* — If it happens that the pawn which a creditor has taken for his security be not sufficient for his payment, and that the creditor cannot be charged with any fault whereby he may have diminished the value of the pawn, he will recover the surplus of his debt out of the other goods of his debtor.‡

XXXII.

1688. *One may mortgage his Estate for the Debt of another Person.* — One may mortgage his estate, not only for his own proper debts, but likewise for the debts of others; in the same manner as one may become surety for other persons.‡

XXXIII.

1689. *Approbation of the Person whose Thing is mortgaged by another.* — If a debtor mortgages that which belongs to another

\* L. 23, D. de pign.; — l. 11, § 1, eod.

† L. 35, § 1, D. de pign. act.

‡ L. 28, D. de reb. cred.; — l. ult. § 4, C. de jure dom. imp.; — l. 9, D. de distr. pign.; — l. 10, C. de obl. et act.

‡ L. 5, § ult. D. de pign. et hyp.

person, and the said person consents to the mortgage, or by some act signifies his approbation of it; as if he signs the contract as a witness, or writes it with his own hand, the mortgage will have its effect. For otherwise he would partake with impunity in the fraud done to the creditor. And it would be the same thing, although it were a father who had mortgaged the houses or lands belonging to his son.<sup>7</sup>

## SECTION II.

OF THE SEVERAL SORTS OF MORTGAGES, AND OF THE MANNER  
HOW A MORTGAGE IS ACQUIRED.

1690. *Two Sorts of Mortgage, Conventional and Legal.*—Seeing the mortgage is an accessory to engagements, and that there are some engagements into which the parties enter by covenant, and others which are formed without a covenant, the mortgage may likewise be acquired either by covenant, and then it is a conventional mortgage, or without a covenant, by the bare effect of the law, which may be called a legal mortgage. Thus, when a seller engages his estate for the warranty of that which he sells, and the buyer his estate for the payment of the price, these are conventional mortgages, being made by covenant or agreement. Thus, when a tutor or guardian is called to that office, his estate is mortgaged for all that he shall owe on the score of his administration; and this mortgage, which the minor acquires by law without a covenant, may be called a legal mortgage.\* Thus the estates of officers that are accountable, and of such persons as are called to municipal offices and employed in collecting the public revenue, are mortgaged for what they shall appear to be indebted to the public.<sup>b</sup> Thus, the sentences of condemnation in a court of justice give a mortgage on the estate of the party condemned.<sup>c</sup> And it is by the authority of the law that all these sorts of mortgages have been established, without the intervention of any covenant.

1691. The conventional mortgage was acquired, under the Ro-

<sup>7</sup> L. 26, § 1, *D. de pign. et hyp.* See the twelfth and fifteenth articles of the seventh section, and the remark on the fifteenth article.

<sup>a</sup> See the thirty-sixth article of the third section of *Tutors*.

<sup>b</sup> See, hereafter, the nineteenth and twentieth articles of the fifth section.

<sup>c</sup> See the fourth article of this section, with the remark upon it.

man law, by the bare effect of a covenant or agreement, if the mortgage was thereby stipulated, and even without any indenture in writing,<sup>a</sup> and without the presence or assistance of any public officer whatsoever; in which the Emperor Leo made some change, by requiring the presence of three witnesses of probity and integrity.<sup>b</sup> But by our usage in France, covenants do not establish a right of mortgage, although it should be therein expressly mentioned, unless the said covenants are made in the presence of public notaries. For, unless this formality were observed, it would be an easy matter for debtors who should have a mind to defraud their creditors to give to their latter creditors ancient mortgages, by antedating the same. Thus, when we shall hereafter make mention of a conventional mortgage, it is always to be understood of covenants made in the presence of notaries public.

## ART. I.

1692. *The Mortgage is either General or Special.*— One may mortgage either all his estate in general, or only some part of it, which he particularly specifies. And this makes two first kinds of mortgage, the one general and the other special; and one may also join both the one and the other together, engaging at the same time both all his estate in general, and likewise some part of it in particular, which he expressly mentioned.<sup>a</sup>

## II.

1693. *The Special Mortgage is of two Sorts.*— The special mortgage is of two sorts. One where the creditor is put into possession, and the other where the thing that is engaged remains in the debtor's custody. Thus, in the mortgage called *antichresis*, the creditor is in possession of the thing engaged to him; and in the bare special mortgage, the debtor remains in possession of the thing that is mortgaged. Thus, one may give his movables for security, whether he delivers them to his creditor, or whether he keeps them in his own hands. But the appropriation of a movable for the security of a debt is not, properly speaking, special, but whilst the thing is in the custody of the creditor, or he has a preference upon it before other creditors.<sup>b</sup>

<sup>a</sup> L. 4, *D. de pign.*<sup>b</sup> L. 11, *Cod. qui potior.*<sup>a</sup> L. 15, § 1, *D. de pign. et hyp.*; — *Novel. 112, c. 1.*<sup>b</sup> L. 11, *D. de pign. act.*; — L. 11, § 1, *D. de pign. et hyp.* See the fifth section, concerning the Preference of Creditors.



## III.

1694. *The Mortgage is either Simple or Privileged.*—The mortgage, under another view, may be divided into two other kinds; one is that of the simple mortgage, and the other is that which gives a preference or a privilege. The simple mortgage is that which is barely an appropriation of the thing mortgaged, without any other difference, among many creditors to whom the same thing has been engaged at different times, than that he who is first in time will be preferred to the others who have no privilege; and the mortgage which is privileged is that which gives a preference without respect to time. Thus, the creditor whose money has been laid out in repairing or rebuilding a house is preferred before the creditors who had a prior mortgage upon the said house.\*

## IV.

1695. *Three Ways of acquiring a Mortgage.*—The mortgage is acquired three manner of ways; either with the consent of the debtor by agreement, if he engages his estate;<sup>a</sup> or without the debtor's consent, by the quality and bare effect of the engagement, the nature of which is such that the law has annexed to it the security of a mortgage, as in the cases mentioned in the following article;<sup>b</sup> or, lastly, the mortgage is acquired by the authority of justice;<sup>c</sup> although the law had given no mortgage, which happens when the creditor who had no mortgage obtains a sentence of condemnation in his favor; for the sentence or decree which condemns the debtor gives a mortgage to the creditor, although no mention of it be made in the sentence.

## V.

1696. *A Mortgage is either Express or Tacit.*—All mortgages are either express or tacit. We call that an express mortgage

\* L. 2, in fine, C. qui pot. in pign. hab.; — l. 4, eod.; — l. 5, D. eod.

<sup>a</sup> L. 17, § 2, D. de pact.; — l. 4, D. de pign. et hyp.

<sup>b</sup> L. 4, D. in quib. caus. pign. vel hyp. tac. contr.; — l. 46, § 3, D. de jur. faci.

<sup>c</sup> L. ult. C. de prest. pign.; — l. 26, D. de pign. act. By the fifty-third article of the ordinance of Moulins, and the declaration of the 10th of July, 1566, upon this article, condemnations in a court of justice give a mortgage from the day of the sentence, if it is confirmed by the decree of a superior court, or if there be no appeal from the sentence. And by the ninety-second and ninety-third articles of the ordinance of 1536, promissory notes in writing give a right of mortgage upon one single default, after a demand of payment; and if the demand be contested, and afterwards proved, the mortgage will take place from the day of the denial or contestation of suit.

which is acquired by a title or deed wherein the mortgage is expressed, such as a bond or a contract.<sup>a</sup> And that is called a tacit mortgage which is acquired by right,<sup>b</sup> although it be not particularly mentioned; such as that which minors, prodigals, and idiots, or madmen, have on the estates of their tutors or guardians;<sup>c</sup> such as the king has on the estates of the farmers and receivers of his revenue;<sup>d</sup> and some others, which shall be explained in the fifth section.

## VI.

1697. *A Mortgage is either Conventional or Legal.*—The distinction explained in the foregoing article, of an express mortgage and of a tacit mortgage, may be applied to that of a conventional mortgage and of a legal mortgage, of which mention has been made in the preamble of this section; for the conventional mortgage is expressly stipulated by the agreement, and the legal mortgage is understood, whether it be expressed or not.<sup>m</sup>

## VII.

1698. *The Creditor cannot by Force take the Pawn from his Debtor.*—A mortgage cannot be acquired but by one of the ways explained in the fourth article; and the creditor cannot of himself either take possession of an immovable thing or seize upon a movable thing belonging to his debtor, unless he consents to it, or it be by the authority of justice, if the debtor does not consent. Thus, much less may the creditor enter the house of his debtor, to take pledges out of it.<sup>n</sup> And if a movable thing, taken away in this manner without the consent of the debtor, should chance to perish, although by a mere accident, the loss of it would fall upon this creditor.<sup>o</sup>

<sup>a</sup> L. 4, D. de pign. et hyp.

<sup>b</sup> L. 4, D. in quib. caus. pign. vel hyp. tac. contr.

<sup>c</sup> L. 20, C. de adm. tut.;—Nov. 118, c. 5, in f.;—l. 19, § 1, ll. 20, 21, 22, D. de reb. auct. jud. poss.;—l. 1, § 1, C. de rei ux. act. See the thirty-sixth article of the third section of Tutors.

<sup>d</sup> L. 2, C. in quib. caus. p. v. hyp. tac. See the nineteenth article of the fifth section.

<sup>e</sup> L. 2, C. de prat. pign. See the fifth article.

<sup>f</sup> L. 11, C. de pign. act.;—l. 3, C. de pign. et hyp.;—Deut. xxiv. 10, 11

<sup>g</sup> L. 30, D. de pign. act.

## SECTION III.

OF THE EFFECTS OF THE MORTGAGE, AND OF THE ENGAGEMENTS  
WHICH IT FORMS ON THE DEBTOR'S PART.

## ART. I.

1699. *The First Effect of the Mortgage is the Right to get the Thing that is mortgaged or pawned exposed to Sale.*—The use of the mortgage being to secure to the creditor his payment, the first effect of the mortgage is the right to sell the pledge or thing mortgaged, whether the creditor has been put into possession of it, or whether it has remained in the hands of the debtor.<sup>a</sup>

## II.

1700. *Second Effect, a Right to follow the Thing mortgaged.*—The second effect of the mortgage is, that into whatsoever hands the thing mortgaged passes, whether it be that the debtor engages it to a second creditor, giving him power to sell it, which he had not given to the first; or that he puts the second creditor into possession; or that he sells the thing, or gives it away, or disposes of it otherwise, or that he is stripped of it without his own act and deed; the creditor to whom he had before mortgaged it has a right to follow the thing, and to evict it from the possessors.<sup>b</sup>

## III.

1701. *The Third Effect, Preference of the First Creditor.*—The third effect of the mortgage, which is a consequence of the first two, is, that, among many creditors to whom the same debtor mortgages the same land or tenement, the first in date is preferred, and has a right to follow the land or tenement, even when it is in the hands of the other creditors, and to recover it from him who is in possession of it.<sup>c</sup>

<sup>a</sup> L. 14, C. de distract. pign.;—l. 9, eod.;—l. 4, D. de pign. act. By our usage, the pawn cannot be sold but with the consent of the debtor, or by the authority of justice. See the ninth article, with the remark on it, and the tenth article.

<sup>b</sup> L. 18, § 2, D. de pign. act.;—v. Nov. 112, c. 1;—l. 12, § ult. D. qui pot. in pign.

<sup>c</sup> L. 2, in fine, l. 4, C. qui pot.;—l. 11, D. eod.;—l. 12, in f. D. qui pot. See the second article.

## IV.

1702. *A Fourth Effect, Security for all the Consequences of the Debt*. — This is likewise a fourth effect of the mortgage, that it serves as a security, not only for what is due at the time that the mortgage is contracted, but also for all the consequences that shall arise from the said debt, and which shall augment it; such as the interest of the principal sum, costs and damages, expenses laid out in preserving the pledge, and others of the like nature.<sup>d</sup> And the creditor shall have his mortgage for all these consequences, from the day that he has it for the principal debt.<sup>e</sup>

## V.

1703. *These Effects take place whether the Mortgage be General or Special*. — All these effects of the mortgage take place equally on the land or tenement that is mortgaged, whether the first creditor had a general mortgage on all the debtor's estate, or a special mortgage on some particular land or tenement; and whether, likewise, the mortgage which the other creditors have be general or special. Thus, he who has the first a general<sup>f</sup> mortgage is preferred before him who has the second mortgage, although it be special. Thus, likewise, the first mortgagee who has a special mortgage is preferred before the second who has a general mortgage.

## VI.

1704. *Discussion in Favor of a Third Possessor*. — Although the creditor who has a mortgage, whether general or special, may exercise his right on all the lands and tenements that are subject to the mortgage, and even on those which are in the possession of third persons; yet it seems agreeable to equity, that, if he can hope to recover payment of his debt out of the other effects which remain with his debtor, he should not begin with troubling the third possessor, even although his mortgage was special; but that before he molests the third possessor, and gives occasion to the consequences of having a recourse against the debtor, he ought to discuss the other effects remaining in the debtor's possession.<sup>g</sup>

<sup>d</sup> L. 8, § ult. D. de pign. act.

<sup>e</sup> L. 18, D. qui pot. in pign.; — v. l. 8, D. de pign. act.

<sup>f</sup> L. 2, D. qui pot. in pign.; — l. 6, C. eod. See the following article.

<sup>g</sup> L. 2, C. de pign. et hyp.; — l. 9, C. de distr. pign.; — l. 47, D. de jur. fac.; — l. 1, C. de conv. fac. deb.; — Nov. 2, c. 2. We have set down here this rule about discussion, be-

## VII.

**1705. *In what Manner a Subsequent Creditor may secure his Mortgage against Prior Creditors.*** — The effect of the mortgage is useless to the creditor, whilst other prior creditors have their

cause it is of the Roman law, and is observed in some provinces. But in others the creditor is not obliged to discuss the goods of the debtor before he comes against the third possessor, and he may seize at the same time, and without discussion, all the estate that is subject to his mortgage, whether it be general or special, although the same be in the possession of third persons. See the fourth article of the second section of *Sureties*.

It is to be observed on this subject of a general and special mortgage, that, although it seem that the special mortgage denotes a more particular security on the houses and lands that are specified than the bare general mortgage which does not specify any one in particular; yet, notwithstanding, it is certain that, as to the right of mortgage and its effects, it is equal to the creditor whether his mortgage be only in general on all his debtor's estate, or there be added to it a special mortgage on some particular land or tenement that is expressly mentioned. For the effects of the mortgage are always the same on the estate that is subject to it, as has been remarked in the fifth article. And the general mortgage gives the same right to the creditor on every one of the lands and tenements which it comprehends, as he could have had from a special mortgage, which should name every one of them in particular. Thus, as to what concerns the effect and use of the mortgage between the creditor and the debtor, there seems to be no other difference between the special and general mortgage than that the special mortgage points out to the creditor certain houses or lands upon which he may exercise his right; and that the general mortgage specifying none in particular, the creditor, who is ignorant what houses and lands belong to his debtor, is obliged to inform himself thereof.

But if we consider the use of the mortgage between the creditors of one and the same debtor, or between a creditor and a third possessor of an estate mortgaged to the said creditor, it would seem by the first two texts cited on this article, that when the creditor who has a special mortgage on some particular land or tenement, and a general mortgage on the whole estate of his debtor, exercises his right of mortgage on other parts of the estate besides those which are specially engaged to him, and his action interests either other creditors or third possessors, whom he calls upon for the estate which they have in their hands, these other creditors and third possessors might oblige him to begin with the discussion of the lands and tenements that are specially mortgaged to him, before he comes to the others. But by this effect of the special mortgage, the precaution which the creditor had taken by stipulating this special security would turn to his prejudice. And, in all appearance, it is this which has given occasion to those who, besides the general mortgage on the whole estate of their debtor, procured some houses and lands to be mortgaged to them in particular, to add this clause, — that the special mortgage should not derogate from the general, nor the general from the special. And seeing the use of this clause is ordinary in all deeds of special mortgages, and that it is highly equitable, seeing that the special mortgage was not added to the general to derogate from it, and to make the condition of the creditor worse; it seems that by an effect of this equity, and by the usage of inserting this clause, it is now come to be always understood, although it be not expressly mentioned, and that the usage has restored the creditors to their natural right of exercising their mortgage indifferently upon the whole estate that is subject to it, without being obliged to discuss previously that part of it on which they have their special mortgage, even although that clause has not been expressed. So that it seems that it is not any more in use to discuss the lands and tenements which are specially mortgaged, before they put in their claim to the others.

But there is another sort of discussion, which is that which has been explained in this

mortgage on the same estate for all that it is worth. But he may secure his mortgage by paying off that which is due to the creditors who have a prior mortgage to his, or by depositing the money, in case the creditors refuse to take it.<sup>h</sup>

### VIII.

1706: *The Same.* — The payment which a creditor makes to another prior creditor secures him his pledge only with regard to the creditors who are posterior to him whom he pays off. But it is useless to him with respect to all other creditors who are prior to his own mortgage, and to that which he has paid off.<sup>i</sup>

article, established in favor of a third possessor who is in possession of houses or lands mortgaged to a creditor. And this discussion has nothing in common with that of a special mortgage before a general one. For, on the contrary, although the mortgage which a creditor has on a house or lands which are in the hands of a third possessor be a special mortgage, yet he cannot exercise it against this third possessor, until he has first discussed the remaining part of the estate that is subject to his mortgage. And this is founded on a principle of equity, which seems to require that this third possessor should not be disturbed in his possession without a necessity, and that he be not forced to have his recourse against the debtor, and that the debtor be not exposed to the consequences of a warranty; but that this third possessor should remain unmolested in his possession, till it shall appear, by the discussion of the other effects, whether the creditor may be paid without molesting the third possessor. It is because of these reasons, and on the foundation of the last text cited on this article, that the discussion in favor of a third possessor is received in some customs; although in others the creditor may bring his action immediately against the third possessor of the thing on which he has his mortgage, and that upon another view of equity, because of the inconveniences which may ensue if the other effects are not sufficient to satisfy the mortgagees. For in that case the discussion proves altogether fruitless, and is of no other use but to multiply lawsuits and costs, which are chargeable both to the creditor, the debtor, and even to the third possessor, seeing the houses or lands which he is in possession of will prove thereby to be engaged for a greater sum than they were before the discussion; whereas the condition of the possessor might have been better if he had discharged the debt at first, in order to keep the estate he was in possession of. So that it might perhaps be more advantageous both to the creditor, the debtor, and also to the third possessor, if there were no discussion at all. For the possessor ought to take his measures aright, and to make his choice, either not to demand the discussion, or to be contented to bear the charges of it in case the discussion prove fruitless by the event.

It will be needless to explain here some other differences which were in the Roman law between the special and general mortgage, seeing they are not in use with us. *L. 12, Cod. de obs. inter vir. et uxor.*; — *L. 3, Cod. de servo pign. dato man.*; — *Nov. 7, c. 8.*

*L. 5, C. qui pater.*; — *L. 1, cod.* This depositing of the money ought to be made, according to the formalities prescribed by our usage, that is, with the permission of the judge, and after calling the adverse party to see the money deposited.

It is to be remarked on this article, that we do not speak here of the substitution to the ancient creditor. See, concerning the said substitution, the sixth article of the sixth section.

<sup>h</sup> This is a consequence of the preceding article. *L. 12, § 1, D. qui pot.*

## IX.

**1707. *Of the Sale of the Thing that is pawned or mortgaged.***—Whether it has been agreed that the creditor might sell the pledge, or whether no mention at all has been made of it, yet nevertheless it may be sold. For it is the natural effect of a pawn or mortgage, that, if the debtor does not pay his debt some other way, the creditor may take his payment out of the price of the thing which is pawned or mortgaged. Thus, the creditor who has stipulated that he may sell the pledge has no preference before him who has made no such stipulation.<sup>1</sup>

## X.

**1708. *Agreement about the Sale of the Pawn.***—If it had been agreed between the debtor and creditor, that the pledge should

<sup>1</sup> *L. 4, D. de pign. act.*; — *L. 12, D. qui potior.* We do not say in this article that the creditor may sell the pledge, but only that the pledge may be sold. For by our usage the creditor cannot of his own authority sell the thing he has in pawn or mortgage, as he might have done by the Roman law. But the thing must be sold either with the debtor's consent, or by authority of justice. Thus, as to immovables, the land or tenement that is mortgaged may be sold by the debtor by mutual consent, either to the creditor himself, for a reasonable price, or to a third person, upon condition that he discharge the debt. But if the debtor refuses to sell the said land or tenement, or is not able to sell it, either because his warranty is not sufficient enough, or for other reasons, the creditor may in that case seize on the land or tenement and cause it to be sold by cant, or auction, observing the necessary publications and other formalities. And this manner of seizure and sale, with all its formalities, has been established in favor of the creditors, that they might procure payment of their debt; in favor of the debtors, that they might find enhancers of the price, or that they might have time for paying; and also in favor of the buyers, that they may ascertain their purchase, by discharging the lands or tenements purchased in this manner from all mortgages, by the effect of a sentence of adjudication, preceded by all these formalities. For the creditors are obliged to make their right known by opposing the seizure and sale of the estates of their debtors, for the security of their mortgages and other rights, excepting only some rights which are preserved without putting in any opposition; such as quitrents, services, feudal duties. And if the creditor does not put in his claim, in order to save his right of mortgage, he will have lost his right on the lands or tenements which are sold in this manner. *Si eo tempore quo prædium distrahebatur, programmata admoniti creditores, cum præsentessent, jus suum executi non sunt, possunt videri obligationem pignoris amisisse.* *L. 6, Cod. de remiss. pign.*; — *v. tit. Cod. de jur. dem. impetr.* Although this law has relation to a usage different from ours, yet it may be applied to it.

As to movables, if the creditor is in possession of a pawn, he may, with the debtor's consent, either buy it himself at a reasonable price, or suffer it to be sold to a third person, and the price to be paid to him; or if the debtor will not consent to the sale, the creditor may procure leave from the judge to have the thing sold. And as for the movables which remain in the hands of the debtor, the creditor who has a mortgage, or an order for seizing and distraining, may cause them to be seized and sold, he observing the formalities prescribed in these sorts of sales.

not be sold till after a certain time, or simply, that it should not be sold at all; the sale in the first case could not be made till after the time limited; and in the second case, the creditor might summon the debtor to pay, and in default of payment might procure an order for the sale, after a delay to be regulated by the judge. For the effect of that agreement is not to render the pawn always useless.<sup>m</sup>

## XI.

1709. *Stipulation that the Pledge shall belong to the Creditor in Default of Payment.* — Although the thing pawned or mortgaged be given that it may be sold in default of payment, yet the creditor cannot stipulate, that, if he is not paid at the term agreed on, the pledge shall from thenceforth be his in lieu of his payment. For such a covenant would be contrary to humanity and good manners, seeing the pledge may chance to be of greater value, or esteemed by the debtor to be worth more than the debt; and because it is given to the creditor only for his security, and not that he may take advantage of the poverty of his debtor.<sup>n</sup> But the debtor and creditor may agree, that, if the debtor does not pay within a certain time, the thing engaged shall remain as sold to the creditor for the price which they shall then regulate between themselves, when the sale is to take effect. And this is a conditional sale, which has nothing unlawful in it,<sup>o</sup> provided that the thing be estimated at a reasonable price, either by a court of justice, or by the mutual consent of debtor and creditor, and with a liberty to the debtor either to part with the pledge to the creditor at that price, paying the overplus, if the pledge be not enough to acquit the debt; or to have it sold by cant or auction; or to take it back himself, he paying the debt. And if the debtor makes choice of this last expedient, the judge may fix a time for his paying the debt, and taking up his pledge.

<sup>m</sup> Ubi vero convenit ne distraheretur, creditor si distraxerit, furti obligatur: nisi si tunc fuerit denunciatum ut solvat, et cessaverit. *L. 4, D. de pign. act.*

These three summonses, or notices, are not in use with us. For, as has been remarked on the ninth article, the pledge cannot be sold but by an order of the judge, if the debtor does not consent to the sale. So that we have conceived this tenth article in a manner conformable to our usage.

<sup>n</sup> *L. ult. C. de pact. pign.* See the eighth article of the third section, and the eleventh and twelfth articles of the twelfth section of the *Contract of Sale*.

<sup>o</sup> *L. 16, § ult. D. de pign. et hyp.* See the fourth article of the fifth section of the *Contract of Sale*, and the seventeenth article of the second section of *Covenants*: *L. ult. C. de jure dgm. impetr.*



## XII.

1710. *When several Things are pawned or mortgaged for the same Debt* — If several things are pawned or mortgaged for one and the same debt, whether by a special or general mortgage, the creditor has it in his choice to exercise his right of mortgage upon which of them he pleases.<sup>1</sup> Thus, the creditor to whom all the movables are engaged may seize upon and cause to be sold such of the movables as he pleases; and he may likewise choose among the immovables. But although all the movables and immovables of a debtor be mortgaged, if the debtor be a minor, the creditor cannot expose to sale nor seize upon the immovables till he has first discussed the movables.<sup>2</sup>

## XIII.

1711. *Whether the Debtor may release one Pawn by giving another in its Stead, or by offering Bail.* — The debtor who hath mortgaged a thing, or given it in pawn, cannot disengage it without the consent of the creditor, even although he should offer bail; for this security is not equal to that of the pawn. But if he offers another pawn which is worth as much or more than that which he gave at first; and if, for example, instead of a bed, a suit of hangings, or other movable that is pawned, the debtor, who has occasion for them, offers silver plate of a sufficient value, and which is his own; it would be equitable not to indulge the creditor in his unreasonable capricious humor, if he should refuse to accept of it.<sup>3</sup>

## XIV.

1712. *If several Things are engaged for one and the same Debt.* — If the debtor hath engaged several things for the security of one only debt, he cannot release any one of them without his creditor's consent, unless he pays the whole debt.<sup>4</sup>

<sup>1</sup> L. 8, D. de distr. pign.

<sup>2</sup> L. 15, § 2, D. de re jud. This law touching the discussion of the movables is abolished by the seventy-fourth article of the ordinance of 1539, and it is observed in France only with respect to minors, except in some customs which direct that the movables be first discussed before they proceed to the seizure of the real estate.

<sup>3</sup> L. 10, D. de pign. act.; — l. 38, D. de rei vind.

<sup>4</sup> L. 19, D. de pign. et hyp. The equity of this article is more apparent, in our usage, in immovables than it is in movables. For as to immovables, each creditor, who knows nothing of the mortgages which other creditors have, may retain his own mortgage upon the whole estate of his debtor, and there is no inconvenience in it. But as to movables,

## XV.

1713. *The Moneys arising from the Fruits of the Thing pawned or mortgaged must first be applied to the Discharge of the Interest, and next of the Debt.* — Seeing the mortgage is given as a security, not only for the principal debt, but also for the interest, if any is due; and that the interest is a recompense for the loss which the creditor sustains by the debtor's delaying to acquit the principal debt; the moneys which may be raised from the fruits of the thing pawned or mortgaged, not being sufficient to acquit both the principal and interest, must be applied in the first place to the discharge of the interest. For the debtor must begin with indemnifying his creditor for the damage he has sustained by this delay.<sup>1</sup>

## XVI.

1714. *Effect of the Mortgage before the Term of Payment.* — Although the term of payment be not yet come, yet the creditor may exercise his right of mortgage for his security, according to the circumstances. Thus, he may oppose the sale of his pledge, whether it be a movable or immovable thing, in order to preserve his right.<sup>2</sup>

## XVII.

1715. *Mortgage for a Conditional Debt.* — If a mortgage hath been given for the security of a debt which depends on the uncertain event of a condition, he who may become creditor when the condition shall happen, not having as yet acquired his right, cannot in the mean while bring his action for the mortgage, whether it be to get the pledge that is engaged to him to be sold, or that he may be put in possession of it. But when the condition shall have happened, it will have that effect which is called retroactive, which will give to the obligation and to the mortgage their force from the day of contract, in the same manner as if there had been no condition at all inserted. So that this creditor will be preferred before the intermediate creditors; that is to say, those who have become creditors between the date of this conditional contract

which have no sequel by a mortgage, if the creditor takes of them in pawn to a much greater value than his debt, there might be a hardship in such a proceeding which might justly deserve to be repressed.

<sup>1</sup> See the fourth article of this section. L. 35, D. de pign. act. See the fifth and seventh articles of the fourth section of *Payments*.

<sup>2</sup> L. 14, D. de pign. et hyp. See the following article.

and the event of the condition. And he may in the mean while, before the condition has happened, watch for the preservation of his right, either by preventing fraudulent alienations, or hindering seizures of the estate subject to his mortgage, or interrupting the prescription of a third in possession.\*

## XVIII.

1716. *Effect of the Mortgage of a Second Creditor upon a Thing engaged to another.*—If a debtor, who has already mortgaged a land or tenement to a creditor, engages it to a second, although this debtor, to avoid the crime of stellionate, declares to the second creditor that the said land or tenement is already engaged to another, the mortgage of the second creditor will have its effect not only upon so much of the land or tenement as remains over and above the value of what is due to the first creditor; but it affects the whole land or tenement, so as to render all and every part of it subject to this second mortgage, after the first creditor shall have been paid off. And it would be the same thing although the debtor had particularly expressed that he engaged to the second creditor only what should remain after the payment of the first. For after the first creditor is paid off, the remainder would comprehend the whole land or tenement.†

## XIX.

1717. *Of the Expenses which the Creditor has laid out on the Pledge.*—All the effects of the mortgage which have been men-

\* L. 13, § 5, *D. de pign. et hyp.*;—l. 9, § 2, *D. qui pot.*;—l. 1, § 1, *cod.* See the foregoing article. We must take this thirteenth law, § 5, *D. de pign.*, in the sense and meaning explained in the article. For it would not be just to take away from this future creditor the security of his mortgage. But under these sorts of conditional obligations, one is entitled to oppose a seizure, and summon a third possessor, in order to interrupt his prescription. And the effect of this diligence is, that with regard to the third possessor the estate will remain subject to the mortgage if the condition happens; and with regard to seizures, this diligence will procure an order from the judge, to oblige the creditors who are posterior to the mortgage of a conditional debt to give security to him to whom the conditional debt is owing to restore to him what they shall have received, to the value of what shall appear to be due in case the condition is fulfilled. Thus, for example, if in a contract of marriage a parent or other relation gives a sum of money to the first male child who shall be born of that marriage, and if the estate of this donor be seized before the birth of a male child, the husband and wife may oppose the seizure, and desire an order from the judge to oblige the posterior creditors, who shall be duly ranked according to their priority, to acknowledge this conditional debt, and to give security that they will make restitution in case a male child shall be born of the said marriage.

† L. 15, § 2, *D. de pign. et hyp.*;—l. 13, § 2, *cod.*

tioned hitherto are as so many engagements to which the debtor is liable. And this is likewise another, that if the creditor has been at any necessary charges for the preservation of the pledge, whether he was in possession of it or not, the debtor is bound to reimburse him, although the thing were no longer in being; as if a house repaired by the creditor had been carried away by a flood, or burnt down without his fault. And if the pledge be still in being, and in the custody of the creditor, he may detain it for expenses of this kind; for they augment the debt, and are a part of it.\*

## XX.

1718. *Improvements of the Pledge made by the Creditor.* — If the creditor has been at any expense which was not necessary for the preservation of the pledge, but which has augmented the value of it; as if he has improved a land or tenement which was mortgaged to him by way of antichresis, that is, that he should reap the fruits of it in lieu of the interest of his debt, so that the debtor, not being in a condition to repay the charges of the improvements, be reduced either to suffer the land or tenement to be sold, or to abandon it; these kinds of expenses will be moderated according to the circumstances. Thus, for example, if the debtor himself had begun these improvements, he will have less reason to complain of them; or if the creditor has reaped from the said improvements fruits to a greater value than the interest of the money which he laid out on them amounts to, he will be entitled to a smaller sum for his reimbursement. And according to the other circumstances, such as the persons, the nature of the land or tenement, the quality of the improvements, the value of the fruits which the creditor shall have reaped, the time that he has enjoyed the fruits, and other circumstances of the like nature, it will be necessary to take such a medium as may not favor either the severity or hardship of the creditor, or the unreasonable nicety of the debtor.\*

## XXI.

1719. *The Creditor does not lose his Debt if his Pledge is evicted from him.* — If the creditor is paid by the debtor's aban-

\* *L. 6, D. de pign. act.*; — *l. 6, C. de pignor.* The creditor has not only a mortgage for this sort of expenses, but he has also a privilege. See the sixth article of the fifth section.

\* *L. 25, D. de pign. act.*; — *v. l. 38, D. de rei vind.* See the seventeenth and eighteenth articles of the tenth section, of the *Contract of Sales*.

doing to him the land or tenement on which he had his mortgage, and afterwards another creditor of this debtor comes and evicts the said land or tenement from him; or if the creditor, having been paid in money by virtue of an order of the judge, he having given security to make restitution in case the condition of a debt prior to his should come to pass, be obliged to return the money he had received in payment, as in the case remarked on the seventeenth article; his debt revives again. For it was extinguished only on condition that the payment which was made to him, whether in land or money, should have its effect.<sup>b</sup>

## XXII.

1720. *When the Debtor gives in Pawn one Thing instead of another.* — The debtor who gives in pledge to his creditor one thing for another, as copper gilt for silver gilt, is guilty of the crime of stellionate, for which he may be punished according to the circumstances.<sup>c</sup>

## XXIII.

1721. *How the Creditor is to be put in Possession of his Pledge.* — If a creditor has a mind to take possession of his pledge by virtue of an agreement which entitles him so to do, and the debtor opposes it, he cannot turn the debtor out of possession by force; but he ought to have recourse to justice, to be put into possession by the authority of the judge, who will give him possession if he sees that he has a right to it.<sup>d</sup>

## XXIV.

1722. *The Debtor cannot take back the Pawn without the Creditor's Consent.* — The debtor whose pledge is in the possession of his creditor, whether by agreement or by the authority of justice, cannot disturb him in his possession. And he would be guilty even of a kind of theft, if, without the creditor's consent, he should take away a movable which he had given him in pawn.<sup>e</sup>

## XXV.

1723. *The Mortgage is limited to the Right which the Debtor had.* — The creditor can pretend to no more right in the pledge

<sup>b</sup> L. 24, D. de pign. act.; — l. 13, § 4, D. de pign.

<sup>c</sup> L. 36, D. de pign. act. See the twentieth and twenty-first articles of the first section.

<sup>d</sup> L. 3, C. de pign.

<sup>e</sup> D. 12, § 2, D. de furtis.

than what the debtor had. For it is only this right that the debtor has engaged.

## XXVI.

1724. *The Effect of the Mortgage depends on the Effect of the Obligation.* — All that has been said in this section concerning the effects of a mortgage is to be understood only of the cases where the obligations, of which the mortgage is a consequence, may subsist and have their effect. For the mortgage being only an accessory to the obligation, it hath not its effect but when the obligation to which it is an accessory ought to have its effect. Thus, the obligation of a minor who has mortgaged his estate being confirmed when he is of age, the mortgage on his estate is likewise confirmed. Thus, in the case of those sorts of obligations which are called natural obligations, of which mention has been made in the ninth article of the fifth section of *Covenants*, the effect of the mortgage depends on that which the obligation shall have.

## SECTION IV.

OF THE ENGAGEMENTS OF THE CREDITOR TO THE DEBTOR, BECAUSE OF THE PAWN OR MORTGAGE.

## ART. I.

1725. *The Creditor is to take Care of the Pledge which is in his Possession.* — The creditor who is not in possession of his pledge contracts no manner of engagement towards his debtor; but if he has the pledge in his custody, his first engagement is to take care of it. And not only will he be answerable for the losses and damages which he may have caused by his own act and deed; but he will be accountable likewise for what shall happen through any negligence, or any fault, which a careful and circumspect person would not readily be guilty of.\*

\* *L. 3, § 1, D. de pign. ; — d. § in fine.*

\* *L. 14, § 1, D. de pign. et hyp. ; — l. 5, cod.*

\* *L. 23, D. de reg. jur. ; — l. 13, § 1, D. de pign. act. ; — l. 14, cod. ; — § ult. Inst. quib. mod. re contr. obl. ; — l. 24, § ult. D. de pign. act. ; — l. 3, in fine, C. de pign. act. ; — l. 7, cod.*

## II.

**1726. *If the Pledge perishes by an Accident.***—If the pledge perishes in the hands of the creditor by an accident, he does not answer for it, and preserves nevertheless his right on the other goods of his debtor.<sup>b</sup> But if the accident was a consequence of some negligence, or of some fault, such as the theft of a movable, or the burning of a house, occasioned by the want of care in the person who enjoys the fruits of it in lieu of the interest of his money, or who possesses it by virtue of some other engagement, he would be answerable for it.

## III.

**1727. *Of the Creditor who uses the Pawn.***—The creditor who uses the pawn, against the will of the owner, commits a kind of theft. For it is not given him in pawn that he may make use of it, but that it may serve as a security to him for his payment; and the thing may be the worse for using.<sup>c</sup>

## IV.

**1728. *If the Creditor receives from the Sale of the Pledge more than the Debt comes to.***—If the creditor receives from the sale of the pledge more than the debt amounts to, he will be obliged to restore the overplus, together with the interest from the time of his delay, although it have not been demanded of him, unless he has used his endeavours to pay it.<sup>d</sup>

## V.

**1729. *The Engagement of the Creditor who enjoys the Fruits of the Pledge in Lieu of the Interest of his Money.***—If the engagement gives to the creditor a right to reap the fruits of the pledge for the interest of his money, as in the case of an antichresis, he ought to restore the revenues which exceed the rent or legal interest that may be due to him. Thus, he who enjoys the rent of a house, or a ground-rent, of greater value than the interest of the money that is due to him, ought to restore the overplus; in the same manner as he who receives more money from the sale of the pledge than

<sup>b</sup> § ult. *Inst. quib. mod. re cont. coll.*; — l. 13, in fine, *D. de pign. act.*; — l. 30, in § *D. ad l.* — l. 5, 6, *C. eod.*; — l. 19, *C. de pign.* See the fourth and fifth articles of the second section of *Letting and Hiring*.

<sup>c</sup> L. 54, *D. de furt.*

<sup>d</sup> L. 6, § 1, *D. de pign. act.* See the eighth article of the first section of *Interests*.

his debt comes to, is obliged to restore the surplus to the owner of the pledge. But if the fruits or other revenues of the houses or lands which are mortgaged by way of antichresis be uncertain, and the creditor is to content himself with them instead of the interest of his debt, whether the same chance to exceed or fall short of the interest, and this agreement have nothing in it contrary to law, as in the case of the twenty-eighth article of the first section, the creditor will not be obliged to give back any of the fruits or revenues which he reaps from the thing mortgaged, although they should exceed the interest of his debt. For seeing he could not demand the deficiency in case the fruits should happen to be less than his interest, so likewise he is not obliged to restore the overplus. But if this mortgage by way of antichresis should appear to have any thing in it contrary to law, or the damage sustained in the fruits to be excessive and usurious, or if the creditor had no just title to his possession and enjoyment, he would be obliged to compensate the overplus of the fruits with the principal sum that should appear to be legally due to him.\*

## VI.

1730. *If the Pledge receives any Augmentation.*—Whatever augmentation may happen to the thing mortgaged, whether by accident or otherwise, the creditor having contributed nothing of his own towards it, the same belongs to the debtor; and the creditor ought to restore it to him, although the pledge was in his possession when this change happened to it. For these augmentations are accessories to the right of property which belongs to the debtor.†

## VII.

1731. *The Creditor cannot acquire the Property of the Pledge by Prescription.*—This is also an engagement of the creditor, who is in possession of a pledge, and of his heirs and executors, that they remain perpetually obliged to restore the pledge after payment of the debt, and can never pretend to have acquired the property thereof by prescription.\*

\* L. 1, C. de pign. act.; — l. 2 et 3, cod.; — l. 1, D. de distr. pign.; — l. 24, § 2, in f. D. de pign. act.; — l. ult. C. de distr. pign.; — l. 27, C. de usur. See the twenty-eighth article of the first section.

† L. 21, § 2, D. de pign. et hyp.

\* L. 10, C. de pign. act.; — l. ult. cod. See the eleventh article of the fifth section of Possession.



## SECTION V.

## OF THE PRIVILEGES OF CREDITORS.

1732. *Three Sorts of Creditors.* — We must distinguish between three sorts of creditors: those who have neither mortgage nor privilege, such as he who has only a bare promise for money lent; those who have a mortgage without a privilege, as he who has an obligation for money lent, passed before notaries public; and those whose credit has some privilege that distinguishes their condition from that of other creditors, and which gives them a preference to those whose credit is prior to theirs. Thus, he who has lent money to buy a house, or to repair it, is preferred, as to that house, before other creditors of the same debtor, although they have mortgages on it which are prior in date.

1733. *Two Sorts of Privileges.* — The privileges of creditors are of two kinds. One is, of those which give the creditors a preference on all the goods, without any particular assignment on any one thing; as, for example, the privilege of the expenses of a lawsuit and that of funeral expenses. And the other is, of those which assign to the creditors their security on certain things, and not on the other goods; such as the privilege of those who have lent money to buy a piece of ground or to build on it, the privilege of the landlord of a house on the movables of his tenant for the rent of his house, and other privileges of the like nature.

1734. We shall not put down among the rules of this section those of the Roman law relating to the privileges which the Emperor Justinian granted to married women for their dowries or marriage portions, giving them the preference for the same before creditors who had prior mortgages,<sup>a</sup> and even before him whose money had been laid out on the purchase or repair of the lands or tenements.<sup>b</sup> For these privileges are not in use with us, except in some provinces where the wife has the preference before creditors who have prior mortgages, and in some places where she has this preference only as to the movables.

1735. We do not reckon in the number of privileges the preference which the creditor hath on the movables that have been given him in pawn, and which are in his custody. For this preference

<sup>a</sup> *L. ult. C. qui pot.*

<sup>b</sup> Nov. 97, c. 3.

is not founded on the quality of the credit, but on the security which the creditor has taken by getting possession of the pledge. But this does not extend to immovables, the possession of which does not give any preference to the creditor, if he has it not otherwise. And as to movables, seeing they are not subject to mortgage by our usage, the creditor who has a movable in pawn, and in his own possession, hath his security on it. See the preamble of the first section of this title, and that of the title of the *Cession of Goods*.<sup>a</sup>

## ART. I.

1736. *Definition of Privilege.*—The privilege of a creditor is the distinguishing right which the nature of his credit gives him, and which makes him to be preferred before other creditors, even those who are prior in time and who have mortgages.<sup>a</sup>

## II.

1737. *Priority of Time is of no Importance among Privileged Creditors.*—Among creditors who are privileged, it is no matter which of them is first or last in order of time; for they are distinguished only by the nature of their privileges. And if two creditors have a privilege of the same kind, although their debts be of different times, yet they ought to be paid in the same order and in the same proportion.<sup>b</sup>

## III.

1738. *Effect of the Privilege.*—All the privileges of creditors have this in common, that the least of them gives the preference before creditors who are such only by writing, or by mortgage, and others who have no manner of privilege. And among those who are privileged there are some who have the preference before others, according to the different qualities of their privileges.<sup>c</sup>

## IV.

1739. *Privilege of the Seller.*—He who has sold an immovable thing, for which he has not received the price, is preferred before the creditors of the purchaser, and before all others, as to the thing that is sold. For the sale implied the condition that the pur-

<sup>a</sup> V. l. 10, D. de pign.

<sup>b</sup> L. 32, D. de reb. auct. jud. poss.; — l. 5, D. qui potior.

<sup>c</sup> L. 32, D. de reb. auct. jud. poss.

<sup>d</sup> L. 5, D. qui pot.

chaser should not be master of the thing till he had paid the price. Thus, the seller who has not received the price may either keep the land or tenement, if the price was to be paid before delivery, or he may follow it into what hands soever it may have passed, if he has delivered it before payment.<sup>d</sup>

## V.

1740. *Privilege of him who lends Money for a Purchase.*—He who lends money to the purchaser, to pay the price of his purchase, has the same privilege as the seller would have if he were not paid. For it is the lender's money that makes the purchase to become part of the estate of the purchaser.<sup>e</sup> But, in order to transfer the right of the seller to him who lends the money for his payment, it is necessary to observe the precautions which shall be explained in the sixth section.

<sup>d</sup> L. 19, *D. de contr. empt.*; — l. 53, *cod.*; — § 41, *Inst. de rerum divis.*; — l. 13, § 8, *D. de act. empt. et vend.*; — l. 22, *D. de hered. vel act. vend.*; — l. 31, § 8, *D. de ædil. edicto*. By the third article of the edict of the month of August, 1669, as to the king's mortgages, the seller in this case is preferred before the king.

The rule which gives this preference to the seller ought to be understood only in the case where it appears by the contract of sale that he has not been paid. For if he had given an acquittance and taken a promise or bond for his payment, he would have lost his preference, the contract appearing to be acquitted. Otherwise those who should afterwards lend to this purchaser might be deceived. And besides, the novation of the obligation extinguishes the mortgage. See the second article of the seventh section.

It is to be remarked on this article, that by our usage it takes place only in immovables, and we have limited it to this sense. For as concerning movables, seeing they have no sequel by mortgage, and that the seller has lost the property of them by delivering them to the buyer, he may seize upon them while they are in the hands of the buyer, and he will have likewise the preference on them for the payment of the price; but if the purchaser has disposed of them to others, the seller cannot seize on them in the hands of third persons for the payment of his price,<sup>e</sup> except in one case allowed of by some customs, to wit, when the movable has been sold without fixing any day or term of payment, the seller expecting to be paid in hand. For in this case the infidelity of the buyer does not deprive the seller of the effect of this agreement, and the seller is considered as remaining master of the thing sold till he is paid for it. Thus, he sues not as creditor of the price, but as owner, who claims his own movable. See the third article of the second section of the *Cession of Goods*.

<sup>e</sup> L. 26, *D. de reb. auct. jud. poss.*; — l. 7, *Cod. qui pot. in pign.*; — l. 17, *Cod. de pign.* This creditor is preferred before the king by the third article of the edict of the month of August, 1669. As to the preference of this creditor before the king, see l. ult. § ult. *D. qui pot.*, et l. 34, *D. de reb. auct. jud. possid.* This preference does not take place, according to our usage, in movables, except whilst they continue in the possession of the debtor. For when they are alienated and out of the hands of the debtor and those of the creditor, neither the privilege nor mortgage have place any longer. See the remark on the fourth article.

## VII.

1741. *Privilege of him who lends to preserve the Thing.* — The creditor whose money has been laid out in preserving or repairing the thing, as, for example, to secure a piece of ground against the current of a river, to prevent the fall of a house, or to rebuild it after its fall, has a privilege. For he has preserved the thing in being for the common interest, both of the proprietor and creditors; and it is as it were his own, to the value of what he has laid out upon it.<sup>f</sup>

## VII.

1742. *Privilege for Improvements.* — Those whose money has been laid out on the improvement of an estate, such as to make a plantation, or to build upon it, or to augment the apartments of a house, or for other the like causes, have a privilege upon the said improvements, as upon a purchase made with their money.<sup>g</sup>

## VIII.

1743. *Effect of this Privilege.* — This preference in respect of the improvements is limited to what remains of them in being, and does not affect the whole body of the estate, as does the preference on account of repairs which have preserved the whole estate in being. For if there remains nothing of the improvements, the estate not being any thing the better for them, and nobody profiting by them, there remains no longer any cause for preference. And when the improvements do subsist, the privilege of him who has been at the charges of them takes place only on the value of what remains of the improvements.<sup>h</sup>

## • IX.

1744. *Privilege of Architects and Workmen.* — Architects and other undertakers, workmen, and artificers, who bestow their labor on buildings or other works, and who furnish materials, and in

<sup>f</sup> L. 25, *D. de reb. cred.*; — l. 24, § 1, *D. de reb. auct. jud. poss.*; — l. 1, *D. de cess. bon.*; — l. 26, *D. de reb. auct. jud. poss.*; — l. 5, *D. qui pot.*; — l. 6, *ead.* See the law quoted on the third article.

<sup>g</sup> L. 34, *D. de reb. auct. jud. poss.*; — l. 26, *ead.* See the fifth article of this section. L. 1, *D. in quib. caus. pign. v. h. tac. contr.*

<sup>h</sup> Quasi pigraus retinere potest eam rem. L. 13, § 8, *D. de act. empt. et vend.* These words, which are for the seller, may be applied to this article. For he who has made the improvements is, with regard to them, in the stead of a seller. See the thirty-first article of this section.

general all those who employ their time, their labor, their care, or furnish any materials, whether it be to make a thing, or to repair it, or to preserve it, have the same privilege for their salaries; and for what they furnish, as those have who have advanced money for these kinds of works, and which the seller has for the price of the thing sold.<sup>1</sup>

## X.

1745. *Privilege of him who lends to the Undertaker of a Work.*

— If a third person lends to an architect, or other undertaker, money, which is laid out on a house or any other work, and the said money has been advanced by order of the master for whom the said work is to be done, this third person shall have the same privilege as if he had lent the money to the master himself for that use.<sup>1</sup> But if the money was lent without the master's knowledge, or without his order, and if the master has paid the said undertaker, he who has lent the money will have his action only against the person to whom he lent it. But if the master has not paid the undertaker, this third person may use the privilege, whether he has lent the money by the master's order or without it, provided he has taken the precautions which shall be explained in the sixth section.

## XI.

1746. *Privilege of Carriers and others.* — Carriers have a privilege on the goods which they have carried, for the carriage of them; and for the duties of toll, customs, or others, which they shall have paid on account of the said goods. And the same privilege have all those whose money has been laid out in expenses of the like necessity, such as for the keeping and feeding of cattle, and others of the like kind.<sup>m</sup>

## XII.

1747. *Privilege on the Fruits of the Ground for the Rent of the Farm.* — The proprietor of an estate that is farmed out has the

<sup>1</sup> In the same manner, and with much more reason, as those have who lend money for these kinds of things. See the fourth, sixth, tenth, and eleventh articles of this section.

See, concerning this privilege with regard to movables, the remarks on the fifth article, as also on the eleventh and twelfth articles.

<sup>l</sup> L. 24, § 1, *D. de reb. auct. jud. poss.*; — l. 1, *D. in quib. caus. pign. vel hyp. t. c.*

<sup>m</sup> L. 6, d. l. §§ 1 et 2, *D. qui pot.* See, concerning this article, the remarks made on the fifth and ninth articles, and on the article which follows.

preference on the fruits that grow on it for the payment of his rent. And this preference is acquired by law, although the lease make no mention of it. For these fruits are not so much his pledge as they are his property, till he has got payment of his rent.<sup>a</sup>

## XIII.

1748. *Privilege of a Quitrent and of the Pension due from an Emphyteutical Tenant.*—He who has made a grant of an estate, on condition to have a quitrent paid him out of it, or who has given an emphyteutical lease of it for a yearly rent or pension, has a privilege for his said quitrent or pension upon the fruits growing on the estate, and also upon the land itself, into what hands soever it may pass. And if the possessor of this estate sells it, or mortgages it, or farms it out, or disposes of it otherwise, or if it be seized on and sold, the first owner will be paid off his quitrent or pension, as well out of the land itself, or out of the moneys arising from the sale of it, preferably to all the creditors of the possessor, as out of the fruits of the ground which are in being and in the hands of the possessor.<sup>o</sup>

## XIV. .

1749. *Privilege on the Movables of the Tenant of a House, for the Rent, and Consequences of the Lease.*—The movables which tenants have in the houses which they rent are engaged to the landlord of the house, and preferably to other creditors, for his security, not only of his rent, but of the other consequences of his lease; such as dilapidations, if any have happened through the fault of the tenant, and all expenses, costs, and damages which the tenant may be liable to on account of his lease.<sup>p</sup>

<sup>a</sup> L 7, D. in quib. caus. pign. vel hyp. tac. contr.;—l. 3, Cod. eod. This preference is to be understood, according to our usage, of fruits which either are not separated from the ground, or are still in the possession of the debtor. For if he has sold and delivered them to one who has bought them fairly and honestly, they cannot be seized on in the hands of the purchaser. Thus, he who in a market buys corn of a farmer cannot be sued by the proprietor of the ground where the corn grew for the payment of the rent of his farm, for he ought to have taken care of his payment. This privilege which proprietors have for the rent of their farm belongs even to those who have no lease in writing. For it is enough that it appears that the fruits which they lay claim to are the produce of their ground. See the fourteenth article.

<sup>o</sup> L 15, D. qui pot.;—l. 31, D. de pign. et hypoth.

<sup>p</sup> L 4, D. in quib. caus. pign. vel hyp. tac. contr.;—l. ult. Cod. eod.;—l. 5, C. de loc.;—l. 2, D. in quib. caus. pign. See the eighteenth article. Although this text does not men-

## XV.

1750. *Of the Movables of the Under-Tenants.* — If there are under-tenants, who occupy only one apartment or other portion of a house, their movables are engaged only for the rent of what they occupy. And if they pay their rent to the tenant who let it to them, the landlord, who did not attach the rent while it was in their hands, can pretend nothing, either on their movables or their rents: for they may pay their rent to the person who let the lodgings to them; although if they pay it to the landlord of the house, it will be a good payment, if the tenant owes him his rent.<sup>a</sup>

## XVI.

1751. *Exception to the two foregoing Articles.* — The preference which is spoken of in the two preceding articles is to be understood only of the movables which the tenant has in the house as furniture to it, or which he designs always to keep in it; and not of such goods as he has put there with design to transport them to another place; as, for example, a suit of hangings which he had bought to send to another house.<sup>r</sup>

## XVII.

1752. *Another Exception.* — If a tenant takes into the house which he rents another person, giving him his lodging gratis, the movables of the said lodger will not be engaged for the rent of that part of the house which the tenant accommodates him with.<sup>s</sup>

## XVIII.

1753. *Privilege for the Rents of other Buildings besides Dwelling-houses.* — This privilege of landlords of houses upon the movables of tenants extends also to the proprietors of shops,

tion the privilege, but only the tacit mortgage, yet this mortgage is privileged, and it is the usage with us.

If the movables belonging to the tenant are not in the places which are let, when the landlord sues for his payment, he cannot lay claim to them when they are in the hands of third persons, unless there have been some fraud in alienating them to his prejudice.

This privilege on the movables of tenants belongs also to those landlords who have no lease in writing. For it is enough that these movables are found in the house which is held by lease, to appropriate them to the landlord. See the twelfth article, and the remark on the twenty-third article.

<sup>a</sup> L. 11, § 5, *D. de pign. act.* See the seventeenth article.

<sup>r</sup> L. 7, § 1, *D. in quib. caus. pign.*; — l. 32, in *f. D. de pign. et hyp.*

<sup>s</sup> L. 5, *D. in quib. caus. pign.*

warehouses, granaries, and of all other places, upon the goods which the tenants of the said places may have in them.<sup>1</sup>

### XIX.

1754. *Privilege of the King.* — All the effects of those who are indebted to the crown, whether they be officers that are accountable either for farms, or other receipts and disbursements of the public money, are mortgaged for all the sums of this nature which they may chance to owe, although there be no express obligation of them, nor condemnation in a court of justice.<sup>2</sup>

### XX.

1755. *The Date of the Mortgage of the Crown.* — The mortgage which is acquired to the crown, on the estates of officers who are accountable, farmers, and others, who receive the public money, takes its origin from the moment of the title of their engagement; as from the date of the lease, if it be a farm; the date of the patent, if it be an office; or the date of the agreement or commission.<sup>3</sup>

### XXI.

1756. *In a Competition of Mortgages, that of the Crown takes place only in its Order.* — The creditors who have a mortgage prior to that of the king preserve their right on the immovables of their debtors. And the mortgage which the king has takes place only in its order.<sup>4</sup>

<sup>1</sup> L. 3, D. in quib. caus. pign.

<sup>2</sup> L. 2, C. in quib. caus. pign. vel hyp. tac. contr.; — l. 3, C. de privil. fisci; — l. 46, § 3, D. de jur. fisci. See the fourth article of the edict of the month of August, 1669. The rule explained in this article does not only relate to officers that are accountable, and to others indebted to the crown, but it is also to be applied to those who receive and collect the public money in the towns and open country; such as consuls, receivers, collectors, and others, whether they take an oath in judgment, or whether they officiate upon their bare nomination. See the next following article, and the twenty-third article, with the remark on it.

<sup>3</sup> L. 3, C. de priv. fisc. This mortgage of the crown is regulated after this manner by the fourth article of the edict of the month of August, 1669.

<sup>4</sup> L. 2, C. de priv. fisc.; — l. 3, D. qui pot.; — l. ult. eod. See the following article. We must add to this article, that, with respect to offices, the king has the preference on the moneys of the office on account of which the debt is due, not only preferably to the creditors by mortgage, but even preferably to the seller himself, on the price of the office, and the perquisites annexed to it, according to the second article of the edict of the month of August, 1669. Which is grounded on this, that the office was originally granted by the king with this burden, and that it is therefore the proper pledge of the king, engaged by privilege for whatever the officer may be indebted on account of the office.



## XXII.

1757. *Exception to the foregoing Rule.* — The foregoing rule is to be understood only of the immovables which the debtor had acquired before his engagement to the crown. But as to those which the debtor acquired after the said engagement, the king is preferred before the creditors who are prior to his mortgage, although all the debtor's estate, present and to come, had been mortgaged to them. And in this concurrence of mortgages, which begin to have their effect in the moment that the new purchase is made, the mortgage of the king takes place before the others.<sup>a</sup>

## XXIII.

1758. *Preference of the King before all Creditors who have neither Mortgage nor Privilege.* — With regard to creditors who have neither mortgage nor privilege, but only a bare personal action, the king is preferred before them on the immovables, because he has always a tacit mortgage without covenant. And he has also the preference on the movables before those who attach them, and before all the creditors who have no privilege. But the creditor who has upon the movable one of the privileges explained in this section, is preferred before the king.<sup>a</sup>

<sup>a</sup> L. 28, *D. de jure fisc.* Pursuant to this text, the same thing hath been ordained by the third article of this very edict of the month of August, 1669, but with an exception for the preference of the seller and of him whose moneys have been laid out on the purchase, provided that mention be made of the moneys being so employed in the articles and deed of contract. We might add, as a reason for this preference of the king on the estate that is acquired after that the officer has been concerned in the receipt of the public money, that it is presumed that the moneys which the said officer, or other person that is accountable, owes to the king, have been laid out on these new purchases, or that the credit which the said employment gave him has facilitated the same.

<sup>a</sup> *Respublica creditrix omnibus chirographariis creditoribus preferatur.* L. 38, § 1, *D. de reb. auct. jud. pot.* *Fiscus semper habet jus pignoris.* L. 46, § 3, *D. de jure fisci.* This word republic in the text does not signify the exchequer. *V. l. 8, D. qui pot.* The prince is with much greater reason entitled to this privilege.

We have added in this article the preference of the privileged creditor on the movables before the king; because this preference is ordained by the first article of the edict of 1669, contrary to the disposition of the Roman law, which gave to the exchequer the preference even before him who had sold or repaired the thing, as Justinian gave it likewise to the wife for her marriage portion preferably to those very privileges. *V. l. 34, D. de reb. auct. jud. pot.*; — Nov. 97, cap. 3. As to the privilege of rent on the movables of the tenant, this edict gives unto it the preference before the debt due to the king, only for the last six months.

What is said in this article, that the king has always a tacit mortgage, is to be understood only of sums due to the king for causes which have been mentioned in the nineteenth article, and not for the land-tax and other imposts due from private persons. For as to

XXIV.

1759. *Privilege of Funeral Charges.* — Merchants, tradesmen, and others, to whom any thing is due for funeral charges, have their action against the heirs or executors, and if there be no heirs or executors, they have it against the goods of the deceased, as if they had contracted with him; and they have, moreover, a privilege, even although the goods of the deceased should not be sufficient to pay his debts; provided these charges do not exceed what was reasonable to be laid out on the funeral, according to the quality and estate of the deceased. For the necessity of this expense makes it necessary to favor with this privilege those who furnish it. But if the funeral charges exceed these bounds, even although the deceased himself had ordered them by his last will and testament, the privilege will be restrained to what shall be judged reasonable and just, according to the circumstances.

XXV.

1760. *Law Charges.* — The expenses of proving the will, or taking administration, of making inventories, of sales, orders of court, and discussions of movables or immovables, and all other necessary law charges, are preferable to all other debts.\* For all the creditors are concerned in these expenses, they being laid out for their common interest.

XXVI.

1761. *Preference on the Goods of Public Depositories, for Things deposited in their Hands.* — In a competition among the creditors of public depositories, whose function is to receive the sums of money or other things that are to be deposited by order of court, the persons who are to receive back what has been thus consigned or deposited are preferred, on the proper goods of these depositories, before their private creditors, who have neither mortgage nor privilege. And this preference is founded upon the interest which

these imposts, there is no mortgage for them on the immovables, unless it be in places where the land-tax is a real burden; but only a preference on the fruits. And it is for this reason that we have not quoted on the privilege of the king this text of the first law, *Cod. in quib. caus. pign. vel hyp. tas. contr.* — *Unversa bona eorum qui consentunt, vel pign. tributi obligati sunt.*

\* L. 15, D. de relig. et sumpt. fun.; — l. 1, cod.; — v. l. 17, D. de reb. anc. jud. pasc.; — L. 12, § 5, D. de relig. et sumpt. fun.; — L. 14, § 3, 4 & 6, D. cod.

\* L. 8, in f. D. de pos.; — l. 71, D. ad leg. Falc.; — l. ult. § 9, C. de jure delib. See the thirty-second article.

the public has in the safety of those deposits which people are obliged to consign into their hands.<sup>4</sup>

## XXVII.

1762. *Preference as to the Deposit that is in Being.*— If among the things deposited, of which mention has been made in the

<sup>d</sup> L. 24, § 2, *D. de reb. auct. jud. poss.*; — l. 8, *D. de pos.* Besides the privilege explained in this article, the usage in France gives to creditors who are to receive back moneys or other things consigned by order of a court of justice two other sorts of security. One is a mortgage on the whole estate of the depositary who is charged with these sorts of deposits; and this mortgage is the effect of the authority of justice, pursuant to what has been said in the fourth article of the second section. For as it is the public justice that charges them with these deposits, so it appropriates their whole estate for the security of the things deposited. So that the persons to whom the things deposited are to be restored will be preferred before the other creditors of the depositary who have mortgages, if the thing was deposited before their mortgage was granted. The other security is the appropriation of the office whose function it is to receive deposits of this nature, such as are in France the offices of the receivers of moneys brought into court, and those of the commissaries of the châtelet, who are depositaries of moneys or other effects, when they proceed to seal up the effects, and to make inventories, and on other occasions of the like nature. For as the function of receiving these deposits is proper to these offices, they are naturally appropriated for the security of those whom justice puts under the necessity of depositing in their hands. Thus, this appropriation of the office for the security of these deposits gives a privilege to the creditors who are to receive them, and makes them preferable to all the creditors of the said officer who have mortgages, even although they be prior in time. But this is to be understood only of offices that are peculiarly destined to this function. For if the court had ordered the moneys to be deposited in the hands of another officer, whose office was not intended for this function, the deposit put into his hands by the authority of justice would give, indeed, a mortgage upon his office, but it ought not to give a preference. For his private creditors would find themselves deceived by this preference, which they could not possibly foresee; whereas the creditors of the person who by his office is a public depositary cannot but know that his office is appropriated for indemnifying the creditors of things deposited into his hands: See the three following articles.

It may be asked, concerning the mortgage which the creditors of sums deposited have on the immovables of the public depositary, from what day this mortgage will have its effect. Whether it will be from the day that the said receiver enters on his office, as in the case of minors, who have a mortgage on the estates of their tutors from the day of their nomination, for sums which they are to receive only a long time after; or if it will commence only from the day of depositing the money. If the mortgage takes place from the day of the admission of the public depositary to his office, the creditors of the moneys that were last deposited will be preferred before the particular creditors of the public depositary who have mortgages, unless their mortgage be prior to the admission of the officer; and if, on the contrary, the mortgage takes place only from the day of making the deposit, it would seem to follow from thence that the creditors of the several orders ought to be preferred one before the other on the immovables, according to the dates of the consignments, although they come all in proportionably as to the price of the office, without any regard to the dates of their consignments, as shall be shown in the twenty-ninth article.

We do not pretend to decide these questions here, nor to treat of them expressly, nor

foregoing article, there be some of them in being, those who have deposited them, or the persons to whom they ought to return, will recover them preferably to all other creditors, for it is their own proper goods.\*

## XXVIII.

1763. *He who innovates the Debt loses his Privilege.* — If he who was creditor to a public depositary because of moneys deposited into his hands, such as those who are to receive back moneys that have been consigned by order of court, or for some other cause, has innovated his debt, and changed the nature of the deposit, as if he has taken a bond as for money lent, he will be entitled no longer to any privilege; and it would be the same thing as if he had left his money in the hands of the depositary, that he might receive interest for it; for he will have thereby changed the nature of the deposit, and converted it into a contract of loan.†

## XXIX.

1764. *Concurrence of Creditors for several Deposits.* — The three preceding articles relate to the competition between creditors who are to receive sums of money or other things deposited; and the particular creditors of the public depositary. But as to the creditors of sums of money or other things deposited, if they come in competition with one another for their respective deposits, the privilege which they had all of them on the office of the receiver, and their preference before his particular creditors, being common to them all, they lose the effect of it among themselves, and they come all in to share equally in the price of the office, in proportion to their respective claims.‡ So that, for example, all the

more than of others which might be started on this subject; we make only this transitory remark, to show how much it is to be wished for that this matter were fully settled.

1. *Le 24, § 2. De de reb. auct. jud. poss.*

2. *Id. 24, § 2. De de reb. auct. jud. poss.* He who takes interest for a sum of money which he had deposited into another's hands becomes creditor of it as of money lent. For the deposit produces no interest, neither can the depositary owe any. So that when he pays interest, it is because he does not keep the money any longer as a deposit, but converts it to his own proper use, with the consent of the person who ought to receive it. And the receiving of interest, although it is not lawful on the part of the creditor, yet it is always a mark of the intention of the creditor and of the debtor to change the deposit into a contract of loan.

3. *Id. 7, § 1. De de pos.* We are to understand the concurrence explained in this article only with respect to all the creditors of one order, considered together as having one and the same credit, and to all those of the other orders considered in the like manner for the

creditors of one order, whose consignment was prior, coming in competition with creditors of another order, whose consignment was made a long time after the first, there would be no preference given to the first on the price of the office that is subject to their privilege; but each order of creditors would have a proportionable share of the price, according to the value of the effects consigned by every one of them. For it is by virtue of their privilege that the creditors of these orders are entitled to receive the price of this office, which was made a part of the estate of this officer only upon condition of its being equally appropriated for the security of all the sums of money or other things that should be thereafter deposited in the hands of the said officer.

## XXX.

1765. *Effect of Privileges.* — All privileges make a particular appropriation, which gives to the creditor who is privileged the thing for his pledge, although there be neither covenant nor condemnation which expressly mentions this preference. For it is annexed to the title of the credit, by the nature of the debt, and although no express mention be made of it. And if the debt were not of itself privileged, it could not be made such by the effect of a covenant.<sup>1</sup>

## XXXI.

1766. *Difference of Privileges as to the Appropriation of Goods.* — Among the privileges of creditors, there are some which affect only one particular thing, and do not reach to the rest of the goods; and others affect all the goods in general, without distinction. Thus, the privilege which the proprietor of a ground has on the fruits of it for the rent of his farm, that of a seller for the price of the thing sold, and that of the person who has lent money

sums that are due to them. But as to the creditors of each order among themselves, there is no contribution. For every one of them ought to receive, in the order in which he is placed, the sum which ought to come to him according as he is ranked; so that he who is ranked in the first place ought to receive his whole debt, if the fund be sufficient, although there should not remain enough for the others.

We have set down in this article this concurrence between creditors of several orders only as to the moneys arising from the sale of the office; for it is their common pledge, appropriated to them by their privilege: and we have not mentioned the same concurrence on the other goods of the officer. Concerning which, the reader may consult the last remark made on the twenty-sixth article.

<sup>1</sup> This is a consequence of all the foregoing articles. *Tit. 22. D. de Cred. in quib. con- pign. vel hyp. tac. contr.*

to buy lands or tenements, or to make improvements on them, do not extend to all the goods of the debtor; but are limited to the things appropriated for the security of that particular debt.<sup>1</sup> And these creditors have against the remainder of the debtor's estate only a personal action,<sup>1</sup> or a mortgage, if they have stipulated it. But law charges and the funeral expenses have their preference upon all the goods without distinction.

## XXXII.

1767. *Competition and Preference among Creditors who are privileged.*—Among creditors who are privileged, some of them are preferred before others, according to the nature of their privileges, and the disposition of the laws or customs.<sup>m</sup> Thus, he who has furnished money to repair a house which was in danger of falling is preferred to the seller of that house, who demands the price of the sale. Thus, he who has let a barn to a farmer will be preferred for the rent of his lease before the proprietor to whom the farmer is indebted for the rent of the farm, on which the fruits which are put into the barn grew. Thus, the expenses at law being the debt of all the parties, they are preferred to all privileges whatsoever. Thus, those who have privileges on movables are preferred to the privilege of the king.<sup>n</sup> Thus, funeral charges are preferred before the rent due to the landlord of the house, on the movables of the tenants.<sup>o</sup> Thus, in all the cases of a concurrence of privileges, their preference is regulated by the distinctions which the nature of the said privileges makes.

## XXXIII.

1768. *A Case of Preference among Creditors who have the same Privilege.*—Who sells a house occupied by a tenant reserves to himself the rent of the house for a certain time, and it be agreed that the movables of the tenant shall serve as a pledge for the security of the rent reserved to the seller, as well as for the rent which shall fall afterwards due to the buyer; the seller shall be paid in the first place out of the movables, if their agreement has not regulated it otherwise.<sup>p</sup>

<sup>1</sup> See the foregoing article. This is a consequence of the nature of a privilege.

<sup>m</sup> L. 17, C. de pign.

<sup>n</sup> This is a consequence of the nature of privileges. See all the articles of this section.

<sup>o</sup> See the remark on the twenty-third article.

<sup>p</sup> L. 14, § 1, D. de rei. et. empt. fin.

<sup>p</sup> L. 13, D. qui potior.

## XXXIV.

1769. *Three Orders of Creditors.* — It follows from all the preceding rules, that among creditors there are three orders. The first is, of those that are privileged, who go before all the others, and take place among themselves according to the distinctions of their preferences. The second is, of those that have mortgages, who have their rank after the privileged creditors, according to the dates of their mortgages. And the third is, of creditors by writing, and others who have only personal actions, who, not being distinguished either by privilege or mortgage, come in therefore jointly together, and share equally in proportion to their debts.<sup>1</sup>

## SECTION VI.

## OF SUBSTITUTION TO THE MORTGAGE OR TO THE PRIVILEGE OF THE CREDITOR.

1770. *Explanation of the Nature of Substitutions, and of their Kinds.* — Although this matter of the substitution to the rights of creditors, being in itself simple and natural, ought to be plain and easy; yet the different ways of acquiring the substitution, and the inconveniences which one may fall into for want of observing in every one of them that which is essential to it, cause a multiplicity of combinations which may perplex this matter, and render it obscure and difficult. For which reason, we have judged it would be useful, before we proceed to explain the rules thereof, to give in a few words a general idea of the nature of substitution, and of its kinds, and what every one of them may have peculiar and essential to it.

1771. *Definition of Substitution.* — The substitution which we treat of here is nothing else but that change which puts another person in the place of the creditor, and which makes the right, the mortgage, the privilege which a creditor has, to pass to the person that is substituted to him, that is to say, who enters into his right.

1772. The most simple manner of substituting, and which makes the rights of the creditor to pass, always to him who is substituted, is the assignment which the creditor makes of his rights. Assignments are of several sorts. Some are general, and of many

<sup>1</sup> This is a consequence of all that has been said in this title.



rights, such as the sale of an inheritance, which transmits to him who buys it all the rights of the heir, that he may exercise them in the same manner as the heir himself might have done. Others are particular, of a certain thing, such as the assignment of a bond. Some are gratuitous, as an assignment made by a donor to a donee, when the donation contains debts due to the donor, or other rights. And there are some assignments which are made for a valuable consideration; as if a debtor assigns a debt that is owing to him for the payment of his creditor, or if a creditor makes over to a third person, for a certain price, a debt that is due to him.

1773. All these sorts of assignments have this effect, that the assignee succeeds in the place of the creditor, and that he may exercise the rights which are made over to him in the same manner as the creditor might have done himself before the assignment, and with the benefit of the mortgage and privilege which the creditor had.

1774. There is another manner of substitution to the rights of a creditor, when his debtor, borrowing money to pay what he owes him, agrees with the person of whom he borrows, that the moneys shall be applied towards the payment of that creditor, and that the person who lends the money shall be substituted in the place of the said creditor. And this acquires to this new creditor the right of the first, provided it be mentioned in the acquittance that the payment is made with his money. For the debtor who had power to engage himself to the first creditor may also engage himself on the same conditions to him who pays off the first creditor; and by putting him in the place of the first creditor who receives his moneys, he does no wrong to his other creditors, and changes nothing in their condition.

1775. The substitution may likewise be acquired without the consent of the creditor, by an order of the judge, and that either with the debtor's consent, or sometimes even without it. Thus, a tutor who is willing to acquit with his own money a debt owing by his pupil to a creditor, who refuses to substitute him in his room, may procure an order to be made for substituting him in the place of the creditor upon his acquitting the debt. And in this case the authority of justice transfers the right of the creditor to the person who pays him, provided he produce the order of court for his substitution, and make it appear that the creditor has been paid with his moneys. For the judge does to him who pays for another only the same justice that is due to him from the debtor, and that without prejudice to any other person.



1776. There is yet another way of acquiring a judicial substitution, without the deed of the person to whom the right belongs, and even against his will; as if the debts owing to a debtor are sold by decree of a court of justice. For the court gives to the purchaser to whom the debts are adjudged the same right which he would have if the debtor had sold it to him; and he will be substituted likewise to the mortgages and privileges.

1777. We must take notice, in the last place, of another sort of substitution, which is acquired without any assignment from the creditor, without the consent of the debtor, and without an order of the judge, but only by the bare effect of the payment made to the creditor. Thus, when a creditor, being desirous to secure his mortgage, and fearing lest a prior creditor should increase his debt by charges, or lest he should seize upon the lands or tenements mortgaged, pays off that creditor, he is substituted in his place, provided it appear by the acquittance that the payment has been made with his money. For the law presumes that, he himself being a creditor, he pays only for the security of his mortgage; and it substitutes him in the place of the creditor whom he pays. And it is the same thing as to him who, having purchased lands or houses, and fearing lest he should be troubled in his possession of them by a creditor prior to his purchase, pays him off. And both in the one and the other of these two cases, these motives justify a substitution which is prejudicial to no person whatsoever.

1778. We see in all these sorts of substitution, that the right of the creditor passes from his person to another, who enters into his place, and that this change can happen only two ways: one, by the will of the creditor who substitutes; the other, without his will, by the effect of the law, which puts in the place of the creditor him to whom equity transmits his right.

#### ART. I.

1779. *The Assignment substitutes to the Mortgage and to the Privilege.*—He to whom a creditor makes over a debt is substituted to his right, and he acquires, together with the credit, the mortgages and privileges which are annexed to it, whether the assignment be made for a valuable consideration, or gratis. For although it be true that the payment extinguishes the debt, and that it seems for that reason that the creditor cannot transmit to another a right which is extinguished in his person, by the pay-

ment; yet the assignment, which is made at the same time, has the same effect as if the creditor had sold his right to him who pays him. And as to the effect of the assignment, it is the same thing to him who pays for the debtor, whether it be the person who is bound jointly with him for the debt, or his surety, or a third person.<sup>a</sup>

## II.

1780. *Substitution without an Assignment.* — Those who, without an assignment from the creditors, procure an order from the judge appointing them, upon their paying the creditors, to be substituted in<sup>o</sup> their place, acquire by the payment the rights of those creditors, their mortgages, and their privileges; and even those of the king, if they purchase the debt that is due to him, and get themselves to be substituted in his stead.<sup>b</sup>

## III.

1781. *In what Manner a Third Person may acquire the Right of a Creditor.* — To acquire without the authority of justice the right of a creditor and his mortgage, it is sufficient to have one of these two things; either that he who pays the creditor take an assignment from him, as has been said in the first article, or that he agree with the debtor that, upon paying the debt for him, he shall be substituted to the rights of the creditor, and that in this case it be mentioned in the acquittance, that the payment was made with his money. For then, although the creditor should refuse to substitute, yet he who pays will acquire his right, by the effect of the payment, and of the agreement with the debtor. And it would be the same thing, if, the moneys lent being put into the hands of the debtor with this agreement, that he who lends the money should be substituted to the rights of the creditor who is discharged with it, the debtor should afterwards make the payment himself, declaring in the acquittance that it is with the money borrowed of that person. But if the payment is made only upon the bare acquittance of the creditor, and not accompanied either with the one or the other of these two ways of acquiring the substitution, it will procure to him who pays only a bare action against the debtor, for recovering from him the sum

<sup>a</sup> L. 6, D. de hered. vel act. vend.; — L. 7, C. de obl. et act.; — l. 6, cod. See the fourth article. L. 36, D. de fidejuss.; — L. 76, D. de solut.

<sup>b</sup> L. et. C. de privil. Reg.

paid on his account, even although it should be expressed in the acquittance, that the payment was made with the moneys of this third person. For it might be presumed that he had acquitted only what he owed.<sup>c</sup>

## IV.

1782. *How a Third Person acquires the Privilege of a Creditor.* — He who pays a creditor that is privileged succeeds to his privilege, whether it be by an assignment from the creditor, who makes over to him simply his right, or by a substitution made by the judge; as has been said in the second article; or by an agreement with the debtor, as shall be explained in the following article.<sup>d</sup>

## V.

1783. *How the Privilege is acquired without Substitution.* — One may acquire the privilege of a creditor without substitution, in the same manner as a mortgage, by an agreement with the debtor, that he who shall pay for him shall have the privilege. And it is no matter whether the payment be made to the creditor by him who lends the money, or by the debtor with whom the money has been intrusted, provided that, both in the one and the other case, it appears by the acquittance that the payment is made with the money of that person,<sup>e</sup> as has been said in relation to the mortgage in the third article.

<sup>c</sup> L. 21, *C. de pign. et hyp.*; — l. 1, *C. de his qui in prior. cred. loc. succ.*; — l. 3, *D. quæ res pign.* See the remark on the third article, as to the case where the debtor makes payment only some time after he has borrowed the moneys for paying the debt.

This manner of acquiring the right of the creditor, without his substitution, is just and equitable, in order to facilitate the payment of debts. And it is but just that the debtors themselves should have power to put in the place of the creditors those who pay for them, since nobody receives any prejudice thereby, and since it is the interest of the debtor that he should have power to make his condition easier by changing his creditor. It was upon this equity that the edict which was made in the year 1609, after the reduction of the rents from eight to six per cent, was founded; that whereas the creditors, not being willing to receive their moneys, refused to substitute, and those who were willing to lend money for redeeming the said rents were afraid lest they should not be substituted to the rights of the creditors who refused to substitute. Provision was therefore made therein by the said edict, and the substitution granted pursuant to this rule.

<sup>d</sup> L. 2, *C. de his qui in pr. cred. loc. succ.*; — l. 3, *C. de priv. sec.*; — l. ult. *cod.*

<sup>e</sup> L. 24, § 3, *D. de reb. auct. j. l. poss.* Add the texts cited on the fourth article.

Although the money lent for the payment be not delivered to the creditor, whether the debtor or by him who lends the money, till some time after their agreement, he who lends the money shall nevertheless be substituted to the rights of the creditor.

VI.

1784. *Of a Creditor who pays off a Creditor more ancient than himself.* — He who, being already a creditor, pays off another creditor of the same debtor who is prior to himself, succeeds to his mortgage, although he have made no such agreement, nor received any substitution. For his quality of creditor makes it to be presumed that he pays him who is a more ancient creditor, with no other view than that he may succeed in his place, and thereby secure his own debt, which distinguishes his condition from him who, having no such interest, pays for the debtor without substitution, and of whom it may be said, that perhaps he was under an obligation to the debtor to pay for him.<sup>f</sup>

VII.

1785. *A Purchaser substituted to the Creditors whom he pays off.* — The purchaser of an estate, employing the price of his purchase for the payment of the creditors to whom the estate was mortgaged, is substituted to their right to the value of what he pays them. For by paying them with the price of their pledge in order to secure it to himself, he preserves it to himself for the value of what he pays them, against other subsequent creditors, although they be prior to his purchase.<sup>g</sup>

VIII.

1786. *Substitution by an Attachment.* — The creditor who, by virtue of his mortgage or of an order from the judge, attaches the rights and actions which his debtor has against those who are indebted to him, procuring what he has attached to be adjudged to him, is substituted to the mortgages and privileges which his debtor had for the debts that are attached.<sup>h</sup>

the debtor's bond to him who advanced the money will serve as a proof that the occasion of the loan was to pay off the creditor, and the creditor's acquittance will prove that the money was put to that use. And as to what is said in the law cited on this article, that there must be no interval of time, that is to be applied to the usage of the Roman law, according to which covenants were often made without any writing; and therefore the distance of time might have occasioned the loss of the proof how the moneys had been

<sup>f</sup> L. 16, D. qui pot. in pign.; — l. 11, § 4, eod.; — l. 12, § 9, eod.; — l. 17, eod.  
<sup>g</sup> L. 3, C. de his qui in prior. cred. loc. suc.; — l. 17, D. qui pot. See the preceding article.

<sup>h</sup> L. 1, C. de prat. pign. The debt which is attached is adjudged to the creditor who attaches, such as it belonged to the debtor.

## IX.

1787. *The Substitution is Null after Payment.*—When the substitution by the creditor is necessary for transmitting his right to the person who pays for the debtor, it ought to be made at the time of payment and of granting the acquittance. For if the payment was consummated without any mention of the substitution, it being made only after payment, it would be useless. And the right of the creditor being extinguished by the payment, he could not make over to another what he had not any longer, nor substitute to a right which was extinct.<sup>1</sup>

## X.

1788. *The Validity of the Substitution depends on the Condition in which the Creditor's Right was at the Time of making the Substitution.*—All substitutions, assignments, and other ways of acquiring the mortgage or privilege of a creditor, whether by covenant or by an order of the judge, or otherwise, have no manner of effect, if, at the time of the substitution, assignment, or other act, the right of the creditor was no more in being, whether it be that it was extinguished by prescription, or annulled by a judgment, or discharged by a payment, or that it had ceased to be through some one of the causes which shall be explained in the following section. Thus, in questions relating to the validity of substitutions, assignments, and other ways of acquiring the mortgage or privilege of a creditor, it is necessary to examine if, at the time of the substitution, the right, the mortgage, or the privilege was still subsisting.<sup>1</sup>

## SECTION VII.

## IN WHAT MANNER THE MORTGAGE ENDS, OR IS EXTINGUISHED.

## ART. I.

1789. *The Mortgage is extinguished by Payment.*—The mortgage being only an accessory of the debt, the payment which annuls the debt extinguishes the mortgage. But it is necessary

<sup>1</sup> L. 76, D. de solut. See the following article.

<sup>1</sup> L. 13, § 2, D. de pign. See the following section.

<sup>2</sup> L. 13, § 2, D. de pign. et hyp. ;—l. 20, C. de pignor. act.

that the payment should be entire, of all that is due for principal, interest, and charges.<sup>b</sup>

## II.

1790. *By a Novation.*—Novation, which extinguishes the first obligation, changing it into a new one, extinguishes also the mortgage which was an accessory to it, if it is not reserved.<sup>c</sup>

## III.

1791. *By the Oath of the Debtor, when the Debt is referred to it, and he swears that he owes nothing, or by a Judgment which acquits him.*—Whatever annuls the debt discharges the mortgage. Thus, when a debtor, to whose oath the debt is referred, swears that he has paid it, or when he is acquitted by a judgment from which there lies no appeal, the debt and the mortgage are annulled. And it is the same thing in all the cases where the obligation subsists no more.<sup>d</sup>

## IV.

1792. *By every Thing that is instead of Payment.*—Whatever may be reckoned to be in the place of payment extinguishes the mortgage. Thus, for example, if the creditor contents himself either with a surety, or with another debtor instead of the former, or with another pledge instead of the first; in all these cases, and others of the like nature, the mortgage ceases, if it appears to have been the intention of the parties to discharge the mortgage, and to restrain the creditor to these other sureties, although his condition become thereby less advantageous.<sup>e</sup>

## V.

1793. *By consigning the Debt in Case the Creditor refuses to receive Payment.*—If it is by reason of the creditor's refusing his payment that he detains the pledge, or insists to have it exposed to sale, the debtor may tender the money in court, and consign it, in order to his being discharged from the debt, to hinder the sale,

<sup>a</sup> L. 25, § 14, D. fam. ercisc. ; — l. 2, in f. C. debit. vend. pign. imp. n. p. ; — l. 3, C. de pign. See the fourth article of the third section of this title.

<sup>b</sup> L. 11, § 1, D. de pign. act. See what novation is in the title of Novations.

<sup>c</sup> L. 13, D. quib. mod. pign. vel hyp. sol. ; — l. 6, cod.

<sup>d</sup> L. 2, D. quib. mod. pign. ; — l. 2, § 3, D. de pign. act. ; — l. 3, C. de lit. pign.

and recover his pledge, together with the costs and damages which the creditor may owe him because of his delay.

## VI.

1794. *If the Payment which was made does not subsist, the Mortgage revives.* — If the payment, or that which was to be in lieu of it, had no effect, the mortgage would revive, together with the credit; as if the creditor had taken in payment an assignment to a debt with warranty, and he could not get payment of it, or houses and lands with the same warranty, which were evicted from him, or a minor had given an acquittance, against which he was relieved. For these kinds of payments imply the condition that they shall subsist. But if a creditor of full age had contented himself with an assignment to a debt at his own peril, and had given a discharge, the mortgage and the credit would remain extinguished, although the creditor should not get payment of the debt that was made over to him.<sup>s</sup>

## VII.

1795. *The Mortgage is extinct if the Pledge is put out of Commerce.* — If the lands or houses that are mortgaged cease to be in commerce, as if they are dedicated to the use of a church or other public place, the mortgage subsists no longer. But the creditor hath his action against the price which his debtor receives for them.<sup>a</sup>

## VIII.

1796. *Or if it happens to perish.* — As the mortgage upon a land or tenement which happens to perish by an inundation, or other accident, subsists no longer, so likewise the mortgage which a creditor has upon a right of usufruct belonging to his debtor will have no longer effect if the usufruct ceases, even although the debtor should survive the loss of his usufruct, as if he had it only for a certain time.<sup>1</sup>

<sup>1</sup> L. 20, § 2, *D. de pign. act.*; — L. 2, § ult. *cod.*; — l. 2, *C. de lit. vend. pign. usque in rem.*  
See, as to the matter of consignment, the remark on the seventh article of the third section.

<sup>s</sup> L. 5, *C. de rem. pign.*

<sup>a</sup> See the twenty-sixth article of the first section.

<sup>1</sup> L. 8, *D. quib. mod. pign.* See the second article of the sixth section of the fifth part.

## IX.

1797. *The Prescription of the Debt extinguishes the Mortgage.*—If the debt for which the mortgage was given be extinguished by prescription, the mortgage, which was only an accessory of the debt, is annulled.<sup>1</sup>

## X.

1798. *If the Debtor loses his Right to the Pledge, the Creditor loses his Mortgage on it.*—If the debtor who has mortgaged a land or tenement happens to lose the right he had to it, as if he is stripped of it by an eviction, or by a power of redemption vested in a former owner or in the next of kin, or by other causes, the mortgage which he had assigned on the said land or tenement does not subsist any longer, unless it was by his own proper act that he lost his right; as if, for example, when he was able to defend himself against the said eviction or power of redemption, he yielded to it; if he neglected to demand the sale of an estate seized on in the hands of a third person, and which belonged to him; if he did not defend himself in a good cause; or if he abandoned any other way his right. For in all these cases the creditor may exercise the rights of his debtor in order to preserve his own.<sup>2</sup>

## XI.

1799. *Effect of Redhibition of the Thing mortgaged.*—If a debtor who had bought a house, or lands, or a movable, and had afterwards engaged it to a creditor, has a mind to dissolve the sale, by redhibition, that is, by obliging the seller to take back the thing sold because of some defect in it, his creditor may hinder him, unless the debtor provides for his security, either by giving him the price which the seller shall be obliged to restore to him, or by

<sup>1</sup> L. 2, § 1, *de mod. pign.*;—l. 12, *D. de divers. temp. præsc.*;—l. 3, *C. de. præsc.* 30 et 40 ann. By the Roman law the hypothecary action was extinguished only by a prescription of forty years against the debtor and his heirs, and likewise against a third possessor, if the debtor was still alive. Thus, the hypothecary action was of a longer duration than the bare personal action. See the end of the preamble of the fourth section of *Prescription and Prescription*. This prescription of forty years is observed in some provinces. But we have conceived the rule according to the common and natural usage, which gives no longer duration to the hypothecary action than to the bare personal action, for the reason explained in the article.

<sup>2</sup> L. 2, § 1, *de mod. pign.*;—l. 12, *D. de divers. temp. præsc.*



letting him have the thing sold, if he is willing to take it at the price which they shall agree on."

## XII.

1800. *The Creditor who consents to the Alienation of his Pledge loses his Mortgage, if he does not expressly reserve it.* — The creditor who consents to the sale, donation, or other alienation, which his debtor makes of a house or lands that are engaged to him, or who suffers it or ratifies it, has no longer any mortgage upon the said house or lands unless he reserves it.<sup>o</sup> For he has consented to an alienation which could not have been made to his prejudice, if he had not approved of it; and his consent would deceive the purchaser, if he might afterwards make use of his right of mortgage.

## XIII.

1801. *If the Creditor consents that his Pledge be engaged to another.* — If a creditor consents that his pledge be engaged to another, he resigns to him his right.<sup>p</sup> But this consent ought to be such as shall be explained in the fifteenth article.

## XIV.

1802. *The Mortgage revives if the Alienation does not take Effect.* — If the sale or other alienation made by the debtor, with the consent of his creditor, happens to be annulled, or, after the obtaining of this consent, the alienation is not accomplished, the creditor in that case enters again into his right. For it was only in favor of that alienation that he renounced his mortgage. And it would be the same thing, if he had consented that his debtor should devise to a legatee the houses or lands mortgaged to him, and the legacy should be found to be null, or the legatee should renounce it.<sup>q</sup>

## XV.

1803. *In what Manner we are to understand the Creditor's Consent to the Alienation.* — We ought not to take for a consent of

<sup>p</sup> L. 4, D. quib. mod. pign. See the first article of the eleventh section of the Contract of Sale.

<sup>q</sup> L. 156, D. de reg. jur.; — l. 7, D. quib. mod. pign.; — l. 4, § 1, cod.; — l. 2, D. de remiss. pign.; — d. l. 4, § 1, in fine, D. quib. mod. pign. Touching this consent, see the fifteenth article of this section.

<sup>r</sup> E. 12, D. quib. mod. pign. c. h. s.

<sup>s</sup> L. 4, § ult. D. quib. mod. pign.; — l. 2, § 6, cod.; — d. l. 4, § 11; — l. 10, cod.

the creditor to the alienation of his pledge, the knowledge which he may have of it, nor the silence which he keeps after he knows it; as if he knows that his debtor is about selling a house which is mortgaged to him, and says nothing of it. But, in order to deprive him of his right, it is necessary that it appear by some act that he knows what is doing to his prejudice, and that he consents to it. And a creditor does not lose his mortgage by his consent, except when it appears evidently that his intention is to resign it, or that there be ground to charge him with dishonesty, for not having declared his right, when he was under an obligation to do it. Thus, for example, if he who had mortgaged specially a house or lands to a former creditor, for an annuity, engages it in the same manner to a second creditor, for another annuity, declaring to him that the said house or lands were not mortgaged to any body else, and the first creditor signed the contract either as a party or a witness, he will have thereby rendered himself an accomplice to this false declaration, and cannot exercise his mortgage on the said house or lands to the prejudice of this second creditor. Thus, on the contrary, if a creditor signs, as witness, a contract of marriage or other deed, by which his debtor engages all his estate, he shall not lose his mortgage for not having entered his protestation. Thus, he who signs, as witness, a testament, in which the testator devises houses or lands that are mortgaged to the said witness, will not lose his mortgage. And in general we ought to judge of the effect of these approbations by signature or otherwise, according to the circumstances of the quality of the acts, of that of the persons, of the knowledge which they may have of the wrong which either their approbation or their silence may do to their own interest and to that of others, of their sincerity or disingenuity, of the intention of the contractors, and other circumstances of the like nature.<sup>r</sup>

<sup>r</sup> L. 8, § 15, *D. quib. mod. pign.*; — l. 9, § 1, *D. quib. mod. pign.*; — l. 34, § 2, *D. de leg. 2.*; — v. l. 8, *D. de resc. vend.*; — l. 39, *D. de pign. act.* It is necessary to remark, on this article, the difference there may be between a creditor's signing an instrument as a party, and his signing it only as a witness. Whatever he signs as a party binds him without doubt. But in deeds which he signs as a witness, and where the signature is put only for attestation to the truth of what is transacted between the contracting parties, one cannot draw a consequence from the witness's signing that may be of prejudice to him, unless he should give occasion by his signing for one of the parties to be cheated, as in the case of the witness who signs the contract in which is inserted the false declaration explained in the article. For in that case the silence of the witness implies a disingenuity, which makes him accessory to the knavery of his debtor. But if a witness does not contribute any thing on his part to the cheating and overreaching any of the parties, and

## TITLE II.

## OF THE SEPARATION OF THE GOODS OF THE DECEASED FROM THOSE OF THE HEIR OR EXECUTOR, BETWEEN THEIR RESPECTIVE CREDITORS.

1804. *The Subject-Matter of this Title.*— We have seen in the foregoing title, that one of the uses of a mortgage is to secure to the creditor the estate of the debtor, into what hands soever it passes. But when it passes only from the debtor to his heir or executor, the creditor preserves his right although he have no mortgage, because the heir or executor succeeds to the estate only on condition that he acquit the debts. Thus, all the creditors of the deceased are, with regard to his heir or executor, in the same condition in which they were with respect to their debtor; every one of them retaining on the estate of the deceased either his mortgage, or his privilege, or his simple credit, such as he had it in the debtor's lifetime. But this change which makes the estate of the debtor to pass to his heir or executor having this effect, that the creditors of the said heir or executor will likewise have their right on that estate which he acquires by inheritance or succession, it happens that, when the heir or executor has not estate enough of his own to satisfy his own creditors, the creditors of the deceased are in danger of seeing the estate of the deceased go to the creditors of the heir or executor; and provision is made against this by separating the estate of the deceased from that of his heir or executor, for the benefit of their respective creditors.

1805. It is by the use of this separation that the creditors of the deceased, who fear that the heir or executor is not solvent, hinder the confusion of the goods of the deceased with those of the heir or executor; that the goods of their debtor may be preserved to them, and may not go to the creditors of the said heir or executor.

1806. But if the creditors of the heir or executor are afraid, on if he gives no express consent which derogates from his right, neither his presence nor his signing ought to hurt him; as appears in the case of this law 39, *D. de pign. act.*, cited on this article, where he who had mortgaged his lands to a creditor does not lose them for having signed, as witness, the testament of the said creditor, who declares his will to be, that one of his children should have the said lands, even although the testator had added that he had purchased those lands of the said witness. See the thirty-third article of the first section.

their part, lest the heir or executor, who is their debtor, engaging himself in an encumbered inheritance or succession, his goods should go to the creditors of the deceased, to their prejudice, the same equity demands that they may have power to distinguish and separate the estate of the heir or executor from that of the deceased. As to which it is necessary to observe, that, although the condition of the creditors of the heir or executor, and that of the creditors of the deceased, ought to be equal, yet the Roman law had ordered it otherwise, and did not allow the separation of goods to the creditors of the heir or executor for this reason, that, a debtor being at liberty to bind himself, he may make the condition of his creditors worse, by entering into new engagements to their prejudice.\* But this nicety has not been received into use with us; and it has been thought reasonable that the liberty which a debtor may have to contract new debts, although prejudice may arise from thence to his creditors, ought not to be drawn to such a consequence. For if it is permitted to this debtor to engage himself to new creditors by accepting a succession charged with debts, his creditors ought not to be debarred from making use of the right which they have on his goods to prevent their being subjected to the charges of that succession; and it is fully as equitable to grant them this separation as it is to grant it against them, to the creditors of the deceased, for the goods of the succession.

1807. It is true that, in certain cases, the Roman law did grant the separation of goods to the creditors of the heir or executor; as if he accepted a burdensome inheritance or succession, in order to defraud his creditors: and even in this case it did not grant it easily. And this separation had likewise place in some other cases, which it would be needless to mention here;† but these exceptions were not sufficient to do justice to the creditors of the heir or executor, and our usage allows them this separation without distinction.

1808. This remark concerning our usage in this matter, will serve as an advertisement, that we are to extend to the creditors of the heir or executor the rules which shall be set down in this title, although mention be made only of the creditors of the

\* L. 1, § 2, D. de separat.

† V. l. 1, § 5, et seq. D. de separat.

## SECTION I.

## OF THE NATURE AND EFFECTS OF THE SEPARATION.

## ART. I.

1809. *The Case of Separation.* — When the creditors of a deceased person are afraid that the heir or executor is not solvent, they may procure an order from the judge for separating the effects of the inheritance or succession from those of the heir or executor, that they may secure to themselves the goods of the deceased, their debtor, against the creditors of his heir or executor.<sup>a</sup>

## II.

1810. *The Separation is independent on the Mortgage.* — The right of this separation is independent on the mortgage, and creditors by writing may demand it. For the bare effect of their debt gives them a preference on the estate of their debtor, before the creditors of his heir or executor, to whom the deceased was under no obligation.<sup>b</sup>

## III.

1811. *Legatees have the Right of Separation.* — The legatees of the deceased have the same right to demand this separation, for they are creditors to the succession. But the creditors of the deceased are preferred before them, because he could not give legacies to their prejudice.<sup>c</sup>

## IV.

1812. *Separation for a Debt that is Conditional, or of which the Term is not yet come.* — A creditor or a legatee, whose right depends on a condition which has not as yet happened, or is suspended by a term which is not yet come, may notwithstanding demand the separation for his security.<sup>d</sup>

<sup>a</sup> L. 1, D. de separat.; — l. 2, C. de bon. aut jud. possid. Although this rule seems to be limited to the creditors of the deceased, yet those of the heir or executor are in equity entitled to the same right, as has been observed in the preamble.

<sup>b</sup> It is not the mortgage that gives this right, but the bare quality of creditor.

<sup>c</sup> L. 6, D. de sep.; — l. 4, § 1, cod.

<sup>d</sup> L. 4, D. de separat.

## V.

1813. *If the Heir or Executor has already alienated the Goods of the Deceased, there can be no Separation.* — If, before the separation was demanded, the heir or executor had alienated, without any intention of defrauding the creditors, goods of the succession, whether movables or immovables, or even the whole succession, the creditors of the deceased could not demand the separation of what had been alienated.\* For the heir or executor, who in that quality was master of the goods, had power to dispose of them. But this alienation with respect to the immovables would be of no prejudice to the creditors of the deceased who had mortgages on them; and they might exercise their mortgage and their privilege, if they had any against the possessors, in the same manner as they might have done if the deceased had made the alienation.†

## VI.

1814. *The Engagement made by the Heir or Executor does not hinder the Separation.* — If the heir or executor had pawned or mortgaged movables or immovables belonging to the inheritance or succession, before the separation was demanded, the creditors of the deceased will nevertheless obtain a separation of those goods that are engaged.\* For the separation has place as long as the property belongs to the heir or executor, and that engagement does not divest him of it.

## VII.

1815. *The Separation takes Place in a Second and Third Succession, and beyond that.* — If the goods of an inheritance or succes-

\* L. 2, D. de separat. Although it may seem as if this law related only to the sale of the inheritance or succession, yet the tenor and motive of it comprehend particular alienations, and the last words of the law show it plainly enough.

† The alienation, into what hands soever the lands and tenements that are mortgaged pass, do no prejudice to the mortgage, as has been observed in the foregoing title. It follows from this rule, that, with regard to the immovables alienated by the heir or executor, the creditors of the deceased, who had no mortgage on them, have lost their right to them, and that there remains to them only the personal action against the heir or executor, and the right of a separation of the goods that may still remain in the hands of the heir or executor. And as to the movables alienated by the heir or executor, the creditors of the deceased, even those who have mortgages, have lost their right to them, in the same manner as they would have lost it if the alienation had been made by the deceased; for they had not acquired a right of property in them by the death of the deceased.

‡ L. 1, § 3, D. de separat.

sion pass from the heir or executor to his heir or executor, and from him again to his successors, and so down to other heirs and executors successively, so that the first inheritance or succession and the following ones are confounded together in the hands of the heirs and executors to whom they descend, the creditors of each inheritance or succession will follow the goods belonging to the same from one heir and executor to the other, and may demand a separation of them.<sup>b</sup>

## VIII.

1816. *If the Debtor succeeds to his Surety, the Separation takes Place.* — If a debtor for whom another person was engaged as surety happens to succeed to him, the creditor may demand against the creditors of his debtor the separation of the goods of the deceased, without any opposition from the creditors of the surety, or those of the debtor who succeeds to him as heir or executor; for although the obligation of the deceased surety be confounded in the person of the debtor who succeeds to him, yet the creditor does not lose the security which he had on the goods of the surety, no more than that which he still retains on the goods of his debtor.<sup>1</sup>

## IX.

1817. *The Separation does not prejudice the Right against the Heir or Executor.* — The creditor who, having demanded the separation, has not been able to procure payment out of the goods of the deceased, retains still his right against the heir or executor. But the creditors of this heir or executor will be preferred before him,<sup>1</sup> if their credit be prior to his engagement to the inheritance or succession.

## X.

1818. *Privileges do not hinder the Separation.* — The separation may be demanded against all persons who have privileges, and even against the exchequer.<sup>m</sup>

<sup>b</sup> L. 1, § 8, *D. de separat.*

<sup>1</sup> L. 3, *D. de separat.* What is said in this article concerning the case where the debtor succeeds to the surety would take place likewise, and that with greater reason, in the case where the surety succeeds to the debtor; and the same creditor who can demand separation of the goods of the surety against the creditors of the debtor who succeeds to him, may without doubt demand separation of the goods of the debtor against the creditors of the surety who succeeds as heir or executor to the debtor.

<sup>1</sup> L. 3, § 2, *D. de separat.*

<sup>m</sup> L. 1, § 4, *D. de separat.*

## XI.

1819. *If one of the Heirs or Executors be a Creditor, he may demand the Separation.* — If among the coheirs or coexecutors there be one of them who is creditor to the deceased, he may demand the separation, against the creditors of the others, excepting only as to the portion of his debt which he himself ought to bear.<sup>a</sup>

## SECTION II.

IN WHAT MANNER THE RIGHT OF SEPARATION IS EXTINGUISHED  
OR LOST.

1820. We shall not insert among the rules of this section that of the Roman law, which did not allow the separation after five years; for this prescription is not in use with us.

## ART. I.

1821. *If the Confusion hinders the Separation.* — If the goods of the deceased happen to be confounded with those of the heir or executor, so as that it is not possible to distinguish and to show what things are part of the succession, and what not, the separation in this case will not take place; for the confusion hinders the effect of it. And it ought to be presumed that what does not appear to be part of the succession belongs to the heir or executor. Otherwise, the creditors of this heir or executor would be obliged to prove the right which he has to all the things he has in his possession, which would neither be just nor possible.<sup>a</sup>

## •II.

1822. *Novation hinders also the Separation.* — If a creditor of the deceased innovates his debt, and contents himself with the obligation of the heir or executor, he cannot demand the separation of the goods of the deceased. For he is no longer a creditor to the deceased, but to the heir or executor.<sup>b</sup>

## III.

1823. *Difficulties which are regulated by the Prudence of the Judge.* — If, the separation being demanded, there occur difficulties

<sup>a</sup> L. 7, C. de bon. auth. jud. poss.

<sup>b</sup> L. 1, § 10, D. de separat.

<sup>a</sup> L. 1, § 12, D. de separat.



in it, as if the confusion of the goods makes the distinction of them uncertain, or that, by reason of other circumstances, there arises a doubt whether the separation ought to take place or not, it will depend on the judge to give such order and directions therein as he shall judge to be most prudent, according to the condition of the things.<sup>c</sup>

### TITLE III.

#### OF THE SOLIDITY AMONG TWO OR MORE DEBTORS, AND AMONG TWO OR MORE CREDITORS.

1824. *The Nature of Solidity.* — There are two ways by which two or more persons may be debtors of one and the same thing. One is, in the cases where they all of them together owe the whole debt, but so as that each of them owes only a portion of it. And the other, in the cases where they are all bound for the whole debt, in such a manner that any one of them alone may be constrained to pay the whole.

1825. This second manner is what is called solidity, it giving the creditor a right to exact the whole debt from any one of the debtors he pleases to choose. This right may be acquired two ways; either by the effect of a covenant, as if several persons borrow a sum of money, and oblige themselves every one for the whole sum to the creditor who lends only to them altogether, and on this condition of their being bound every one for the whole sum; or even by the nature of the debt itself, as if several persons have committed some crime, some offence, or caused some damage, through a fault that may be imputed to them all. For in this case, seeing it is the act of every one of them that has caused the damage, they are all of them obliged in such a manner to repair it, that each of them in particular is bound for the whole. And the being accessory to the crime or offence, or the having a share in the fault, rendering every one of them guilty of it, makes them consequently answerable for the whole.<sup>a</sup>

1826. We shall speak in this title only of the solidity in cove-

<sup>c</sup> L. 1, § 14, *D. de separat.*

<sup>a</sup> L. 15, § 2, *D. quod vi aut clam.*

nants; and the rules concerning it, which shall be here explained, may suffice for the other, according as they are capable of being applied to it, and particularly to the solidity which may arise from faults which are not accompanied with any crime or offence,<sup>b</sup> and which are one of the matters that come within the design of this work, the same having been treated of in the eighth title of the second book.

1827. This solidity is to be understood only of what concerns the interest of the creditor, and does not hinder the debt from being divided among the debtors, according to the portion that each of them ought to bear of it.

1828. As a debt may be due in the whole by every one of the debtors to the creditor, so, likewise, there may be another sort of solidity, of a debt due to many creditors, whether by one debtor alone or by many, if the condition of the debt be such that, as every one of the debtors who is bound for the whole debt may be constrained alone to pay the whole, so every one of the creditors among whom the solidity is may have alone and by himself the right to exact the whole debt, and to discharge the debtor of it, with respect to all the other creditors.

## SECTION I.

### OF SOLIDITY AMONG DEBTORS.

#### ART. I.

1829. *Definition of Solidity.*—The solidity among debtors is the engagement which obliges every one of them to the creditor for the whole debt.<sup>a</sup>

#### II.

1830. *There is no Solidity unless it be expressed.*—The obligation of two or more debtors, who promise one and the same thing, does not bind every one of them for the whole, unless it be particularly so expressed in the obligation.<sup>b</sup> And each debtor will be bound only for his own share of the debt. And it would be the

<sup>a</sup> See the fifth article of the first section of *Damages occasioned by Faults, &c.*

<sup>b</sup> *L. 3, § 1, D. de duob. reis*; — *l. 2, C. eod.*; — § 1, *Inst. eod.* See the third article.

<sup>c</sup> *L. 11, in fin. D. de duob. reis*; — *J. 47, D. locat.*

same thing if two or more persons were condemned by a court of justice to pay one and the same thing, and that the sentence did not expressly bear that each of them should be liable for the whole.<sup>e</sup> For in a doubt, obligations are to be interpreted in favor of those who are bound.<sup>d</sup>

### III.

1831. *The Solidity does not hinder the Division of the Debt among the Debtors.* — Although it has been agreed that every one of the debtors should be bound for the whole debt, yet it is nevertheless divided among them; and the creditor cannot immediately sue any one of them for the whole debt. But before he demand from one the portions due by the others, he ought to discuss every one for his own portion; and he may afterwards recover the portions of those who were not able to pay from the other remaining debtors. For the clause of solidity being inserted in the obligation only for the creditor's greater security, the solidity implies the condition that each debtor obliges himself to pay for the others only in case that some of them fail to pay their proportions. Thus, when some of the debtors prove insolvent, or because of their absence the creditor cannot get payment of their portions of the debt, the other debtors answer for them, and every one bears his part of the deficiency in proportion to his own share.<sup>e</sup> But if the debtors who are bound each of them for the whole debt renounce this benefit which the law gives them, and which is called the benefit of division, every one of them may be constrained alone to pay the whole debt; for every one may renounce what the law establishes in his favor.<sup>f</sup> And he who is forced to pay the whole debt will have his remedy against the other debtors, as shall be shewn in the sixth article.

<sup>e</sup> L. 43, *D. de re judic.*; — l. 1, *C. si plures una sent. cond. s.*

<sup>d</sup> See the thirteenth article of the second section of *Covenants*.

<sup>e</sup> Nov. 99, c. 1.

<sup>f</sup> See the twenty-seventh article of the second section of the *Rules of Law*. It is because of this right which the debtors, who are bound each of them for the whole debt, have to demand the obligation to be divided, that it is usual to insert into bonds by which the parties oblige themselves every one for the whole debt, a clause whereby it is declared that the parties who are bound renounce this benefit of division. And this renunciation has this effect, that, although all the debtors be able to pay, yet the creditor has the liberty to address himself to any one of them for the whole debt, without engaging in the discussion of every one of them in particular for their respective proportions. This benefit of division is only for civil debts, and not for crimes.

## IV.

1832. *In all Sorts of Obligations the Parties may bind themselves for the whole.*—The obligation may be such as to bind every one of the parties for the whole debt, let the cause of the engagement be of what nature soever it will. Thus, several persons may oblige themselves after this manner, in a loan, in a sale, in a contract of letting and hiring, in a deposit, and in all other sorts of engagements. And one may bind himself in this manner for a legacy, for a guardianship, for an engagement entered into by order of the judge, and for all other causes whatsoever.<sup>s</sup>

## V.

1833. *The Condition of Parties who are obliged each of them for the whole may be different.*—Although the solidity renders the condition of the parties who are bound jointly together equal, in that every one of them is bound for the whole; yet they may be otherwise distinguished by differences which render the obligation more or less hard with respect to some than to others. Thus, in the case of two persons bound solidly for the same thing, one may give particular securities which the other does not, as a pledge or surety. Thus, the obligation of one may be pure and simple, whilst that of the other is conditional; or the term of payment may be shorter for one than for the other. But these differences are no hindrance why the creditor may not sue him who owes without a condition, or whose term is come, without waiting for the condition or term of the other.<sup>h</sup>

## VI.

1834. *Relief of him who pays for the others.*—If one of the debtors who are obliged solidly together pays for the others, he shall have his remedy against them for recovering their proportions, and so much as every one of them ought to pay of the portions of those who prove insolvent, but no more. For as the debt is divided, with respect to the creditor, so the relief of him who pays for the others is divided also, and is limited, with regard to each debtor, to his portion, because it is only his portion that is paid for him.<sup>i</sup>

<sup>s</sup> L. 9, D. de duob. reis; — l. 13, § 9, D. locat.; — l. 14, D. de duob. reis.

<sup>h</sup> L. 7, D. de duob. reis; — § ult. Inst. cod.; — l. 6, § 1, cod.; — v. l. 9, § 1, cod.

<sup>i</sup> L. 2, C. de duob. reis. It is in this manner that this relief ought to have its effect, if the debtor who pays for the others has no other right besides the indemnity which they

## VII.

1835. *The Action against one of the Debtors does not make the Solidity to cease.*— If, among several debtors who are bound every one of them for the whole debt, the creditor seeks for payment from one of them whom he chooses, without suing the others; he retains nevertheless the liberty of bringing his action afterwards against the other debtors, whether the first to whom he addressed himself were solvent or not.<sup>1</sup>

## VIII.

1836. *The Personal Exception which one of the Debtors may have does not serve for the others.*— All the exceptions which the parties who are obliged may have against the creditor, and which are not limited to their persons, but which have relation to the common obligation, serve for the discharge of all the parties obliged. Thus, for example, if the obligation hath been contracted by force, if it is contrary to good manners, if it is null, if it is acquitted, these kinds of exceptions which relate to the obligation are common to all the parties who are bound by it. But the personal exceptions which some of the parties obliged may have, such as a minority, the interdiction of a prodigal, or some change of condition, which should make the recovering of the debt either impossible or difficult to the creditor, such as a natural or civil death, and the other obstacles of the like nature, which might happen on the part of some of the debtors, would not hinder the effect of the solidity with regard to the others.<sup>2</sup> For these exceptions and these changes do not extinguish the debt, and each debtor owes the whole debt. But if one of the debtors had a personal exception which should extinguish the debt as to his portion, this exception would avail the others for that portion. Thus,

owe reciprocally one to another for their portions. For this is the effect of the benefit of division; and if the relief were to be always for the whole debt, each debtor, being sued in an action of relief for the whole, might sue his fellow-debtors in the same manner, which would occasion a multiplicity of actions of relief, full of inconveniences. But if they have renounced the benefit of division with respect to the creditor, and if he who pays for the others takes from the creditor a substitution to his rights, the said debtor succeeding in that case in the room of the creditor, he has an action against every one of his fellow-debtors for recovering the whole, excepting the portion of the debt which he himself was bound to.

<sup>1</sup> L. 28, C. de fidejuss.

<sup>2</sup> L. 21, § ult. D. de pact.; — l. 25, § eod.; — v. tot. tit. C. de fidejuss. min.; — l. ult. D. de duob. reis. See the tenth article of the first section of *Sureties*, and the first, second, third, fourth, and fifth articles of the fifth section of the same title.

for example, if one of the debtors should appear to be in his own right a creditor to their common creditor, his fellow-debtors might demand of their common creditor a compensation of the portion of the debt which would fall to the share of their fellow-debtor, who is creditor to him. And as to the overplus of what might still be due from their creditor to this their fellow-debtor, they could not demand a compensation of it, unless they had otherwise the right of this their fellow-debtor.<sup>a</sup>

## IX.

1837. *The Demand of the Debt from one of the Debtors hinders Prescription by the others.*—If the creditor of several persons who are indebted for one and the same thing brings his action against any one of them, his demand will preserve his whole right, and will hinder prescription with respect to the other debtors.<sup>o</sup>

## SECTION II.

## OF SOLIDITY AMONG CREDITORS.

## ART. I.

1838. *Wherein consists this Solidity.*—The solidity among several creditors hath not this effect, that every one of them may appropriate the whole debt to himself, and deprive the others of their shares; but it consists only in this, that every one of them has a right to demand and receive the whole, and the debtor remains quit, with respect to them all, by paying the debt to any one of them.<sup>a</sup>

## II.

1839. *How it is acquired.*—This solidity depends on the title which may give it, and on that which may show that what is

<sup>a</sup> L. 10, *D. de duob. reis*. It is in the sense of this article that we are to understand this last text. For it would not be just to compel one of the debtors to pay the portion of him who should have a compensation to make with the creditor. Since, if this compensation were not made, and the debtor who had right to make it should prove insolvent, those who shall have paid for him would be without relief for having paid what he did not owe or what he might have justly compensated.

<sup>o</sup> See the seventeenth article of the fifth section of *Possession and Prescription*, and the law which is there quoted, and the fifth article of the following section.

<sup>a</sup> L. 13, § ult. *D. de acceptil.*; — l. 31, § 1, *D. de novat.*; — § 1, *Inst. de duob. reis*.

owing to several persons is due to every one of them in the whole. Thus, when two persons lend a sum of money, or sell a house or lands, they may treat in such a manner as that the payment may be made to any one of the two singly; and they will be creditors each of them for the whole, either of the money lent, or of the price of the sale. But if it were only said that a debtor should owe a sum of money to two creditors, without mentioning any thing of the solidity, in that case each creditor could demand no more than his own portion.<sup>b</sup>

### III.

1840. *If one Creditor demands the Debt without the others.* — If, in the case of two or more creditors, where each of them has a right to demand and receive the whole debt, one of them does demand it, the payment cannot be made to the other creditors without him. For he has determined the debtor not to pay, unless he consents to it; and it may so happen, that those who do not put in their claim may have lost their right.<sup>c</sup>

### IV.

1841. *If he innovates or makes over the Debt to another.* — When one of the creditors of one and the same debt may alone demand the whole debt, and receive it, he may also innovate the debt, and delegate or assign it over to others; for he might discharge the debt, and even give an acquittance, without receiving any thing.<sup>d</sup> But this creditor ought to account to the others for these changes.<sup>e</sup>

### V.

1842. *The Demand by one is of Use to the others.* — If, where several persons have one and the same right, one of them bring his action for the debt, his demand interrupts the prescription against the other creditors.<sup>f</sup>

<sup>b</sup> Cum tabulis esset comprehensum, illum et illum centum aureos stipulatos, neque adjectum, ita ut duo rei stipulandi essent, virilem partem singuli stipulati videbantur. L. 11, § 1, *D. de duobus reis*. It appears by this text that these words *duo rei stipulandi* implied the solidity.<sup>a</sup>

<sup>c</sup> L. 18, *D. de duob. reis*.

<sup>d</sup> L. 31, § 1, *D. de novat*. See what novation and delegation are, in the titles where they are expressly treated of.

<sup>e</sup> See the sixth article.

<sup>f</sup> See the ninth article of the foregoing section, and what is cited on it.

## VI.

1843. *One of these Creditors cannot do any Prejudice to the others.* — The use which one of the creditors may make of the right to demand alone, and receive, the whole debt, cannot hurt the others. And he ought to account to them for the manner in which he shall have used this right.<sup>s</sup>

## TITLE IV.

## OF CAUTIONS, OR SURETIES.

1844. *Use of Cautions and Sureties.* — No body is ignorant of the frequent use of cautions or sureties. These two names are given to those who oblige themselves for others whose obligation is not thought sufficient, whether it be for money or for other causes. They are called cautions because their obligation is a security. They are called sureties, because it is upon their faith that those to whom they engage themselves rely. This is the original signification of these two words.

1845. The obligation, therefore, of cautions or sureties is an accessory to another obligation. Thus, we call the person for whom the surety binds himself the principal debtor.

1846. The use of sureties extends to all manner of engagements, and comprehends two sorts of suretyships. One is concerning the payment of a sum of money, or the performance of some other engagement, such as the undertaking of a work, a warranty, and others of the like nature; to assure the person to whom the surety engages himself, that what is promised by the principal debtor shall be performed. The other sort of suretyship relates to the validity of the obligation in the cases where it may be liable to be vacated, as if the principal debtor were a minor, although able to pay, the engagement of the surety would be, not only to pay the debt if the minor's obligation were not annulled, but to make good the obligation in case the minor should be relieved from it, and to pay for him.\*

<sup>s</sup> This is a consequence of the nature of this kind of solidity among creditors. For they have not left their debt to the hazard which of them can get payment of it first.

\* See the second article of the fifth section. •



1847. Suretyships may be divided into three sorts. The first is of those that are given willingly, and by mutual consent, for all manner of engagements, whether they be formed by covenant or otherwise. Thus, one gives caution for a loan, for a warranty, for the price of a sale, for the rent of a lease, and for other obligations which are contracted by covenants. Thus, tutors and guardians sometimes give security.

1848. The second sort is of suretyships enjoined by some law. Thus, by the Roman law, plaintiffs and defendants were obliged to give caution for several causes relating to judicial proceedings.<sup>b</sup> Thus, in France, by an edict of the month of January, 1557, those to whom any thing falls by devolution are obliged to give caution to pay what shall be adjudged. And there are other cases in which the ordinances oblige to give caution, which it would be to no purpose to mention here.

1849. The third sort of suretyships is of those ordered by the judge, whether he does it at the instance or upon an offer of the parties, or *ex officio*. Thus, sometimes a thing that is in dispute is adjudged to one of the parties provisionally, he giving security to restore it if it be so decreed. Thus, bail is ordered to be given for the appearance of a prisoner, who is set at liberty on this condition. Thus, in settling the rank of payment among creditors, it is ordered that those who shall receive sums which may be liable to be demanded back shall give caution to pay them back again to prior creditors, to whom the said sums shall be found to be due, as in the case of *provisional debt*, as has been remarked on the seventeenth article of the third section of *Pawns and Mortgages*.

## SECTION I.

### THE NATURE OF THE OBLIGATION OF CAUTIONS OR SURETIES, AND THE MANNER IN WHICH IT IS CONTRACTED.

#### ART. I.

1850. *Definition of Sureties.*—Sureties are those who oblige themselves for other persons, and who answer in their names for the security of some engagement, such as a loan, a warranty, or any other obligation.<sup>a</sup>

<sup>b</sup> V. tit. *Inst. de satial*, et *D. lib. 2, tit. 6, 8, 9, 11.*

<sup>a</sup> L. 1, § 8, *D. de oblig. et act.* See the following article.

## II.

1851. *Caution may be given for all Manner of Engagements.* — There is no honest and lawful engagement to which we may not add the security of a caution to that which the principal debtor gives himself,<sup>b</sup> provided that the giving of the said caution be not contrary to good manners. For there are lawful engagements in which it would not be decent to give security.<sup>c</sup>

## III.

1852. *It may be given for a Natural Obligation.* — This use of suretyships in all manner of engagements extends not only to those which are made with the mutual consent of the parties by covenants, to those of tutors and curators, to those even of sureties themselves (for we may take security for a surety), and, in general, to all other sorts of engagements in which the civil laws give the creditor an action against the person who is obliged, and which are called, for this reason, civil obligations;<sup>d</sup> but caution may also be given for that sort of obligations which are called barely natural, of which we have spoken in the ninth article of the fifth section of *Covenants*. For in these sorts of obligations there is formed a natural engagement, which he who becomes surety for it makes good in his person, although in the person of the principal debtor it be useless. Thus, in the customs where the wife, who is in the power of her husband, cannot be bound any manner of way, if the husband becomes surety for the obligation of his wife, he shall be obliged, although the obligation of his wife remains always null.<sup>e</sup>

## IV.

1853. *Security for a Debt to be contracted.* — We may give security, not only for a present obligation, or for one that has been already contracted, but also for an obligation to be contracted; as if he who foresees a business for which he may stand in need of money gives beforehand the security of a surety to the person who

<sup>b</sup> *L. 1, D. de fidejuss.*; — *l. 8, § 6, eod.*; — *§ 1, Inst. eod.*

<sup>c</sup> See the ninth article.

<sup>d</sup> *L. 8, §§ 1 et 2, D. de fidejuss. et mand.*; — *d. l. 8, § 4, § ult. D. eod.* This surety of a surety, that is taken in a court of justice, is termed in France a *certifier*; because he certifies or undertakes that the first surety is good.

<sup>e</sup> *L. 16, § 3, D. de fidej.*; — *§ 1, Inst. eod.* See the ninth article of the fifth section of *Covenants*.

to lend him the money, the said surety obliging himself beforehand for the money that is to be lent. And this might happen, if, for example, he who is to be surety should have affairs to call him away before the money is actually paid to the borrower, or in other cases and for other causes, as for the warranty of a sale, or some other engagement.<sup>f</sup>

## V.

1854. *The Surety can be bound for no more than the Debtor.* — Of what nature soever the principal obligation be, the engagement of the surety can never be harder than that of the principal debtor. For his obligation is only an accessory to the other;<sup>g</sup> and if he should oblige himself to any thing more, or to conditions that are more burdensome, he would be surety only for what is contained in the principal obligation. And the obligation for the overplus will not be reckoned a part of the suretyship, but his own proper debt, if by the circumstances the obligation for the overplus ought to subsist.

## VI.

1855. *But he may be bound for less.* — The obligation of the surety may be less than that of the principal debtor. Thus, he may oblige himself only for a part of the debt, or of some other engagement.<sup>h</sup> Thus, he may oblige himself only upon some condition, although the debt be pure and simple.<sup>i</sup> Thus, he may take a longer term than that of the principal obligation,<sup>j</sup> or a place more convenient for payment.<sup>k</sup> And, in a word, he may soften his condition all the ways they can agree on.

## VII.

1856. *Surety without the Knowledge of the Debtor.* — One may become surety without an order from the person for whom he binds himself, and even without his knowledge.<sup>l</sup> For on the part of the creditor it is just that he be at liberty to take his security

<sup>f</sup> L. 6, D. de fidejuss.; — § 3, Inst. eod.; — l. 6, § ult. D. de fidejuss.; — l. 55, eod.; — l. 50, D. de pecul.

<sup>g</sup> L. 8, § 7, D. de fidejuss.; — l. 16, §§ 1 et 2, eod.; — l. 34, eod.; — § 5, Inst. eod. See the last text quoted on the following article.

<sup>h</sup> L. 9, D. de fidejuss.; — § 5, Inst. eod.

<sup>i</sup> D. § 5; — l. 6, § 1, D. eod.

<sup>j</sup> D. § 5.

<sup>k</sup> L. 16, § 1, D. de fidejuss.

<sup>l</sup> L. 30, D. de fidejuss.; — l. 20, § 1, D. mand.

independently of the will of his debtor; and as to the surety himself, he may do this good office to his absent friend, in the same manner as one may take care of the affairs of an absent person.\*

## VIII.

1857. *In Crimes there is no giving of Security, no more than Warranty.*—In the matter of crimes and offences, those who commit them by order of other persons, or who make themselves accomplices of them, cannot take security or warranty for being saved harmless from the events which may follow thereupon, or for assuring to themselves the profits which may arise from thence. For the obligation of such a surety and of such a warranty would be another crime. But he who has committed a crime or an offence may give security for the civil interest, and even for the fines, and other pecuniary mulcts, which he may have incurred by his offence. For it is just, and for the public good, that they should be acquitted.†

## IX.

1858. *Some Honest and Fair Engagements in which it is not lawful to take Security.*—There are some honest and lawful engagements in which one cannot take security, because the nature of the engagement would make the taking of security to be reckoned an indecent thing. Thus, it would be contrary to good manners for a partner to give security to his copartner that he will not cheat him, or for an umpire to give security that he will pronounce sentence in the matter referred to him, or judge uprightly. Thus, in a case of another nature, one ought not to take security for the restitution of a dowry, either from the husband, or from other persons who are to receive it for his use, such as his father or his guardian. For the dowry being an accessory to the engagement of the marriage, it would be unworthy of the strict union of matrimony, which puts the wife under the power of the husband, with whom she intrusts her person, to demand any such security.‡ And

\* See the title *Of those who manage the Affairs of others without their Knowledge.*

† L. 8, § 5, *D. de fidejuss.*; — l. 70, § ult. *D. de fidejuss.*

‡ L. 1, *C. de fidej. vel mand. dot. dent.*; — l. 8, *C. de pact. conv.* Seeing our usage allows an indefinite liberty of inserting in contracts of marriage, all sorts of covenants, and even some which would be unlawful in other contracts, such as the institution of an heir that is irrevocable; it would seem that for that reason, and in consideration of the favor of dowries, the taking of security for a dowry ought not to be forbidden, and that the surety who binds himself on that account ought not to be discharged from his engagement, especially if the dowry be in danger. But nevertheless we have thought proper to insert

it would be a seed of discord in families, which ought to be united by marriages. But the father and mother of the husband may oblige themselves for their son to make restitution of the dowry. For the obligation of their goods is the same with that of the son who is to inherit them. And it is usual, that he who marries has no other estate besides what his parents give him, either at the time of the marriage, or at their death; which makes their obligation for the security of the dowry to be just and reasonable.

## X.

1859. *The Surety is not discharged by the Restitution of the Principal Debtor.*—Although the obligation of a surety be only an accessory to that of the principal debtor, yet he who has bound himself surety for a person who may get himself relieved from his obligation, such as a minor, or a prodigal who is interdicted, is not discharged from his suretyship by the restitution of the principal debtor; and the obligation subsists in his person, unless the restitution were grounded upon some fraud or other vice which should have the effect to annul the right of the creditor. But bare restitution of the principal debtor is an event which the creditor did foresee and guard against, by securing his debt by the additional obligation of a surety, who on his part could not be ignorant of this consequence of his engagement.\*

## XI.

1860. *The Minor says his Surety harmless, if he is not relieved from his Obligation.*—The surety for a minor has his action of

here the rule which was prescribed in this matter by the Christian emperors, and which is so agreeable to the mutual love and confidence which our religion enjoins to married persons.

\* L. 2, C. de fidejuss. min.;—l. 25, D. de fidejuss.;—l. 70, § 4, cod.;—l. 7, in f. D. de except. We must observe, from this last law, the difference which the Romans made between the surety for money borrowed by a son who was under his father's jurisdiction, and the surety of a minor. The surety of a son living under the paternal authority was not obliged, no more than the son himself, because of the vice of the obligation which was prohibited by law. L. 9, § 3, D. de senat. Maced. But the surety for a minor was not discharged with him, if the minor was deceived only in the thing, and not through any fraud used by the creditor; as, for example, if, the minor having borrowed money, he had not laid it out to any profitable use. For in this case the obligation is annulled only because of the minority, and not on account of any vice in the obligation. D. l. 2, Cod. de fidej. min.

See the first, second, third, fourth, and fifth articles of the fifth section of this title, and the eighth article of the first section of the *Solidity among two or more*, &c. As to the obligation of a son subject to the paternal authority, see the fourth section of the *Loan of Money and other Things to be restored in Kind*.

relief against him to save him harmless, if the obligation has been profitable to the minor. But if it has not been advantageous to him, and he on that account has been relieved from it, he may likewise be relieved from his obligation to indemnify his surety.\*

## XII.

1861. *The Giving of Counsel and Recommending do not bind one as Surety.* — The engagement of sureties consists in this, that they oblige themselves in their own names to be answerable for the effect of the obligation for which they become sureties. But those who, without any design of engaging themselves, recommend the person who is to be bound, or advise the treating with him, do not by that means bind themselves as sureties, unless there were on their part some fraud, or other circumstances which ought to make them guarantees of the event.†

## XIII.

1862. *Qualities of Caution or Security taken in a Court of Justice.* — When a private person receives security, he accepts or rejects, as he thinks good, those who are offered to him as sureties, and he settles his security in such manner as he and his debtor can agree. But when caution or security is taken in a court of justice, it is the office of the judge to receive or reject it, according as the person who offers the security, and the surety himself, can show that the security is sufficient; which depends on three qualities that are to be considered in sureties, according to the engagements for which they are to be answerable: the solvency of the persons, the facility of suing them at law, and the validity of their engagement. Thus, the want of an estate, the dignity of the persons, and the other qualities which make the suing them at law difficult, and their incapacity of being bound, are causes for rejecting the cautions or sureties that are offered in a court of justice.‡

## XIV.

1863. *Heirs or Executors of Sureties.* — The engagements of

\* L. 1, C. de fidej. min. See the second article of the fifth section.

† See the last article of the first section of *Proxies, Mandates, &c.*

‡ L. 2, D. qui satisd. cog.; — l. 7, eod.; — l. 3, D. de fidej. Although some of these texts do not relate to all manner of sureties, yet we may apply them to the rule explained in this article.

sureties pass to their heirs<sup>2</sup> or executors, excepting such as affect the person of the surety, such as imprisonment or the like, if the engagement was such that the surety was bound to deliver himself up prisoner. For he had power to bind his own person, but not the person of his heir or executor. And as the heirs or executors of sureties enter into their engagements, so they have likewise the same benefits which the law grants to the sureties themselves.<sup>3</sup>

## XV.

1864. *When a Surety is once received, he cannot afterwards be rejected.* — He who has accepted of a surety, having once declared his approbation of him, cannot afterwards demand another; even although the said surety should prove insolvent.<sup>4</sup>

## XVI.

1865. *The Sureties for Persons that are accountable are not bound for the Penalties to which they may be liable.* — The sureties for officers, and other persons employed in the receipt of the public money, are not answerable for the pecuniary mulcts to which the said persons may be liable on account of their misdemeanour.<sup>5</sup>

## SECTION II.

## OF THE ENGAGEMENTS OF THE SURETY TO THE CREDITOR.

## ART. I.

1866. *The Surety cannot be sued till after the Discussion of the Principal Debtor.* — The obligation of the surety being only accessory to, and coming in aid of, that of the principal debtor, and for satisfying what he shall fail to acquit, the said obligation is as it were conditional, not to have its effect except in the case where the debtor is not able to pay. Thus, the surety cannot be sued till after the creditor has used all necessary diligence for the discussion of the principal debtor, and has not been able to recover payment.<sup>6</sup>

<sup>2</sup> L. 4, § 1, *D. de fidejuss.*; — § 2, *Inst. eod.*

<sup>3</sup> L. 27, § 3, *eod.* See what these benefits are, sect. 2, art. 1 and 6, sect. 4, art. 1. See the remark on the first article of the fourth section.

<sup>4</sup> L. 3, in *f. D. de fidejuss.*

<sup>5</sup> L. 68, *D. de fidejuss.*; — l. ult. *C. de per. cor. qui pro mag. inst.*

<sup>6</sup> § ult. *Inst. de replic.*; — Nov. 4, c. 1; — l. 68, § 1, in *f. D. de fidejuss.*; — v. l. 13, in *f.*;

## II.

1867. *Exception as to Judicial Sureties.*—Those who are judicial sureties may be prosecuted without a previous discussion of the principal debtor,<sup>b</sup> not only because they oblige themselves to the court of justice, the authority whereof requires it should be so, but also because of the nature of the debts in which this security may be found to be necessary. For they are such, that one ought not to allow in them the delay of a discussion. Thus, for example, if, pursuant to an order of justice for the payment of creditors, one of them receives a sum of money, on condition that he give security to restore it to other persons to whom the said money ought to go, in a certain case, as that of the birth of a child, who is called to a substitution, or other the like case; the giving of this security is ordained only to the end that the said money may be immediately repaid, if the case does happen, and that it be delivered to the person who ought to have it, in the same manner as if the money had remained in the hands of the receiver of all moneys deposited in court, which ought to be delivered up without delay. And we shall see in the other cases of judicial sureties a like equity for not admitting in them the benefit of discussion.

## III.

1868. *Another Exception, when the Debtor is Absent, and has no visible Estate.*—If the principal debtor is absent, or has not a visible estate, so that no action can be brought against him, or he made to pay, the surety may be sued; unless he obtains a delay from the court, in order to find out some effects belonging to the debtor, or to make him pay the debt, after which delay, if the creditor is not satisfied, he may compel the surety to pay the debt.<sup>c</sup>

—l. 55, in f. eod.; —l. 116, D. de verb. oblig. Besides this benefit of discussion, which is explained in this article, there are two others which sureties have. See the sixth article of this section, and the first article of the fourth section, with the remark upon it. This benefit of discussion is granted only to those who are bound barely as sureties, for their obligation is explained by this quality. But if those who, with regard to the principal debtor, are only his sureties, make themselves principal debtors with respect to the creditor, and oblige themselves, as is usual in this quality, equally with the principal debtor for the whole debt, renouncing this benefit of discussion, they are no more to be considered as sureties. See the third article of the first section of the *Solidity among two or more*, &c., with the remark upon it. See the two following articles.

<sup>b</sup> L. 1, D. jud. solv.; —v. Inst. de satisd., et l. ult. § 1, C. de usur. re jud.

<sup>c</sup> Nov. 4, c 1



## IV.

1869. *The Discussion does not extend to Goods alienated by the Debtor.* — The discussion which the creditor is obliged to make of the goods of the debtor, before he sues the surety, does not extend to the goods on which he has a mortgage, and which have passed from the hands of the debtor to purchasers and third possessors; but only to the goods which the debtor has actually in his possession. And the creditor cannot sue the third possessor till he has first discussed the goods of the debtor, and likewise prosecuted his personal action against the surety. But he cannot exercise the mortgage which he has upon the estate of the surety, except in the case where he cannot recover payment out of what is in the hands of a third possessor.<sup>d</sup>

## V.

1870. *The Surety cannot oblige the Creditor to sue the Debtor.* — Although it be the interest of the surety that the creditor should recover payment from the debtor, yet he cannot oblige the creditor to sue him for it. For the creditor may defer the discussion of the principal debtor, without losing the security which he has taken by having another person bound for the debt.<sup>e</sup> But if a minor, whose guardian had given security for his administration, being come of age, and, finding his guardian indebted to him and at that time able to pay him, should neglect to sue him, and in the mean while the guardian should become insolvent, his surety ought not in this case to be easily condemned to the minor.<sup>f</sup> For the engagement of this surety was only to answer for the guardian's administration, and for his being able to pay, after the expiration of the guardianship, whatever he should chance to be indebted to the minor. Thus, the surety having satisfied his engagement, since the guardian was solvent after the expiration of the guardianship, the negligence of the minor in not suing him after the account was stated might be imputed to him according to the circumstances.

<sup>d</sup> Nov. 4, c. 2. By the customs of some provinces in France, this discussion is observed; but in other customs the third possessor may be sued without this previous discussion. See the sixth article of the third section of *Mortgages*, and the remark which is there made upon it.

<sup>e</sup> L. 62, *D. de fidejuss.* See the third article of the third section, as to the diligence which the surety may use on his part against the debtor.

<sup>f</sup> L. 41, *D. de fidejuss.*

## VI.

1871. *In what Manner several Sureties are bound.*—If several persons become sureties for one and the same thing, every one of them is answerable for the whole. For every one of them engages for the whole debt or other engagement, and to make up what the principal debtor shall not be able to pay. Thus, their obligation naturally binds every one of them for the whole debt, after the discussion of the principal debtor. But their obligation is divided in the same manner, and for the same reason, as that of principal debtors, who are jointly bound each of them for the whole debt. Thus, when the sureties are solvent, the creditor can demand from each of them only his share of the debt. But the portions of those who are insolvent are thrown upon the others, and every one bears his part thereof upon the foot of his own portion of the whole debt.<sup>c</sup>

## VII.

1872. *If the Obligation of one of the Sureties is annulled, the others answer for his Portion.*—If, of two or more sureties, one happens to have sufficient reasons for vacating his obligation; as if it was a minor, or a married woman who had no power to bind herself, or who is not bound according to form; the other sureties will be answerable for the portion of this surety who is discharged.<sup>d</sup>

## VIII.

1873. *What are the Exceptions of the Debtor that are common to the Surety.*—All the defences which the debtor has against the creditor are common to the sureties. As if the obligation, or a part of it, happens to be acquitted; if it is prescribed; if the debt was referred to the debtor's oath, and he had sworn, either that he never owed any thing, or that he had paid it; or if he has other exceptions of the like nature. For the surety is only answerable for what shall be legally due; and whatever annuls or diminishes the obligation of the debtor annuls or diminishes the obligation of

<sup>c</sup> § 4, *Inst. de fidejuss.*; — l. 26, *D. cod.* — l. 10, § 1, *C. cod.* See the first article of the fourth section. This right which sureties have to divide their obligations is called the benefit of division. See the third article of the first section of the *Solidity, &c.*, the first article of this section, and the first article of the fourth section, with the remarks on those articles, where it appears that those who have this benefit may renounce it.

<sup>d</sup> L. 48, *D. de fidejuss.*

the surety, which is an accessory to the other. Thus, he may make use of these defences, although the principal debtor should decline to use them himself.<sup>1</sup> But if the defences of the principal debtor are only drawn from his own person; as if he may obtain relief because he was a minor when he contracted the obligation; if he cannot be sued because he has made over all his effects to his creditors, or because they have been confiscated; these sorts of exceptions will not avail the surety. For it was to guard against them that the creditor got the surety to be bound.<sup>1</sup>

## IX.

1874. *The Engagement of the Surety follows the Obligation.*—The engagement of the surety is not limited to the person of the creditor to whom he obliges himself, but his obligation is annexed to that of the principal debtor, and passes with it to the persons who shall afterwards have the right to it. And if, for example, an heir or executor takes security from one that is debtor to the inheritance, and is obliged afterwards to restore the inheritance to another, either because of a substitution, or because, his institution not subsisting, he ceases to be heir or executor; this surety will remain obliged to him to whom the inheritance shall be restored.<sup>m</sup>

## SECTION III.

OF THE ENGAGEMENTS OF THE DEBTOR TOWARDS HIS SURETY, AND  
OF THE SURETY TOWARDS THE DEBTOR.

## ART. I.

1875. *The Debtor ought to save the Surety harmless.*—The principal debtor is obliged to save his surety harmless, either by getting him discharged from his suretyship, or by acquitting the debt. And although there should be no express promise to indemnify him, yet it is enough that it does appear that the surety is obliged

<sup>1</sup> L. 32, *D. de fidejuss.*; — l. 19, *D. de exception.*; — l. 11, *C. de except. seu præs.*; — l. 4, *Inst. de replic.*; — l. ult. in *f. D. de jurejur.* See the first and the following articles of the fifth section.

<sup>1</sup> D. § 4, *Inst. de replic.*; — l. 1, *C. de fidejuss.* See the sixth article of the fifth section.

<sup>m</sup> L. 21, *D. de fidejuss.* This surety cannot pretend that he became bound only in consideration of the said heir or executor. For besides that he ought to have expressed so much, it might be replied to him, that, if he had not engaged himself, the creditor might have sued the debtor, or taken other sureties.

for the debtor only in this quality. For it implies the engagement to save him harmless.<sup>a</sup>

## II.

1876. *Indemnity for the Consequences of the Suretyship.* — If the creditor, not receiving satisfaction from the principal debtor, brings his action against the surety, and forces him to pay the debt, the surety will recover from the debtor both the principal sum and interest which he shall have paid to the creditor, as also the interest of the said principal and interest. For with regard to him, all the money which he has paid on the debtor's account is a capital of which he ought to be indemnified, in the same manner as, and with much more reason than, a factor or agent, who does the business of an absent person without his knowledge; seeing what moneys they advance, they do it of their own accord, and that it is by constraint that the surety makes payment. And if he suffers otherwise any damage, or is put to any charges, as if the creditor sues him, or attaches his goods, he will also be reimbursed of the expenses which he shall have been put to, and of all of his damages, and likewise of the charges he shall be at in suing the debtor for his reimbursement.<sup>b</sup>

## III.

1877. *A Case where the Surety may sue the Debtor for his Indemnity before he has been called upon by the Creditor.* — If the principal debtor fails to pay the creditor at the term, the surety may sue him after the term is expired, to oblige him to acquit the debt, although the creditor demand nothing. And if the indemnity of the surety were in hazard, he might sue the debtor, even before the term, for his own safety. Thus, when the debtor squanders away his estate, or his goods are attached, the surety may put in his claim, and take such other measures for his own safety as the circumstances of the danger shall render necessary.<sup>c</sup>

<sup>a</sup> L. 3, D. de negot. gest.; — l. 4, eod.; — l. 20, § 1, D. mand.

<sup>b</sup> This is a consequence of the preceding article. § 8, Inst. de fidejuss.; — l. 45, § 6, D. mand.; — l. 50, § 1, eod. See, touching the interest of sums paid by the surety, the fourth article of the second section of *Proxies*, and the fifth article of the second section of *those who manage the Affairs of others*.

<sup>c</sup> L. 38, § 1, D. mand.

## IV.

1878. *If the Surety pays before the Term.*—If the surety pays before the term, he cannot bring his action for relief against the debtor till after the term is elapsed.<sup>d</sup> For he had no power to make the condition of the debtor worse, who is not bound to pay till the term comes.

## V.

1879. *He may pay after the Term without being called on.*—The surety may, if he pleases, pay after the term. And although he has neither been adjudged to pay the debt, nor sued by the creditor, yet he will nevertheless have his action of relief against the debtor.<sup>e</sup> For the obligation both of the debtor and surety was to pay at the term. So that he acquits the common engagement.

## VI.

1880. *If he pays imprudently what was not due.*—Although the surety may pay the debt without being sued for it, he ought not however to do any prejudice to the exceptions which the principal debtor might have against the creditor. And if, for example, the surety, knowing that the debtor had either paid or had sufficient grounds for annulling the debt, pays it nevertheless, he cannot recover from the debtor what he shall have acquitted in this manner.<sup>f</sup>

## VII.

1881. *If the Surety pays, being ignorant of the Exceptions which the Debtor has against the Debt.*—If the surety, being summoned to pay, acquits the debt fairly and honestly, in order to prevent an execution or attachment of his goods, and being ignorant either that the debtor had a compensation to make, or that he has paid the debt, or that he had other grounds of defence against the creditor, he will nevertheless have his relief against the debtor. For the debtor ought to blame himself, that he did not give notice to the surety not to pay the debt.<sup>g</sup> But if the surety pays rashly, without being called on, without necessity, and without acquainting the debtor, who might, on his part, not have had time to inform the surety of the reasons he had to offer why he ought not to

<sup>d</sup> L. 31, *D. de fidejuss.*

<sup>e</sup> L. 10, § 11, *D. mand.* See the following articles.

<sup>f</sup> L. 29, *D. mand.* See the following article.

<sup>g</sup> L. 29, *D. mand.*; — d. l. 29, § 2.

be compelled to pay the debt, there might be ground, according to the circumstances, for imputing to the surety that he had paid it wrongfully.

### VIII.

1882. *If the Surety pays, notwithstanding he had an Exception for his own Person.*—If the surety had any defence peculiar to himself, which was not common to the debtor; as if he was a minor, and for that reason might get himself relieved from his obligation; or if he had any other personal exception, and if he pays the debt voluntarily, without taking advantage of the said exception, he will nevertheless have his action for relief against the debtor. For by having waived his own right, he has done no wrong to the debtor, and he has only acquitted him of what he owed.<sup>a</sup>

### IX.

1883. *If the Surety does not make any Defence when sued, or neglects to appeal from the Sentence.*—If the surety, being sued by the creditor, does not use the means for obtaining a delay which he might make use of; as if he does not allege in his defence certain nullities in the proceedings in the cause, which would not be sufficient to discharge the debtor, and, after having acquainted the debtor with the creditor's demand, pays the debt; the debtor cannot blame him for not having taken the advantage of such defences. But if, the surety being condemned to pay the debt, whether it be after having defended himself, or without making any defence, he does not appeal from the sentence, or if he does appeal, but does not acquaint the debtor therewith; and, in general, whatever be the conduct of the surety, and whatever event it may have, it is by the circumstances of his conduct, and of that of the debtor, that we must discern whether the surety ought to have defended himself or not, or to have appealed or not; whether he has defended himself well or ill, if he has given timely notice to the debtor, if he has paid the debt rightfully or wrongfully, if he has paid more than was due; and by these circumstances we are to judge whether the surety ought to recover either barely what was owing by the debtor, or also the charges he has been at, or if he ought to lose them.<sup>1</sup>

<sup>a</sup> L. 29, § 8, D. mand.

<sup>1</sup> L. 29, § 4, D. mand.;—L. 8, § 8, cod

## X.

1884. *If the Surety does not acquaint the Debtor that he has paid the Debt for him:*— If, the surety having paid the debt without acquainting the debtor, the debtor pays it a second time, the surety will have no relief against him. For he would be in the fault for having suffered the debtor to be in danger of paying twice.<sup>1</sup>

## XI.

1885. *Surety for a Thing deposited, or for a Thing lent.*— The engagement of the surety being only accessory to that of the principal debtor, he is bound only precisely for that which is owing by the person for whom he engages himself. Thus, for example, if one had taken security from a depositary, or from him who had borrowed a thing for use, he who becomes surety for such an engagement would not be obliged to make good the thing deposited or lent, if it should chance to perish by an accident; but he would only be bound to answer for the fraud and negligence of the principal debtor; for it was in that only that the obligation consisted.<sup>2</sup>

## XII.

1886. *If the Creditor gives the Surety a discharge of the Debt.*— If the creditor, or another person having his right, gives an acquittance to the surety, with intention to make him a present of the debt, as a recompense for some service, or out of some other motive, this surety may recover the debt from the debtor; for this favor was designed for the surety alone, and not intended for the benefit of the debtor. But if the creditor had a mind only to discharge the surety, without giving him the debt, the right of the creditor will remain entire against the debtor, and the surety will only be discharged of his suretyship. And this will depend on the manner in which the creditor shall have expressed himself, in order to make his intention known.<sup>3</sup>

<sup>1</sup> L. 39, § 3, D. mand.

<sup>2</sup> L. 2, D. de fidej. et mand.

<sup>3</sup> L. 10, § ult. D. mand.; — l. 12, cod.; — l. 26, § 3, cod.

## SECTION IV.

### OF THE ENGAGEMENTS OF SURETIES TO ONE ANOTHER.

#### ART. I.

1887. *In what Manner one of the Sureties paying the Debt may sue his Fellow-Sureties for their Shares of it.* — If one of the sureties pays the debt, he shall have his relief only against the debtor, and not against his fellow-sureties; for he acquits only his own engagement; and since the payment which he makes, without making use of the benefit of division against the other sureties, extinguishes the principal obligation, that of the fellow-sureties, which was only an accessory to it, subsists no longer. But if, in paying the debt, he gets himself to be substituted to the creditor, he will have his right for recovering the shares of every one of the other sureties. This substitution by the creditor having this effect, that although the right of the creditor seems to be annulled by the payment, yet this right subsists so as to pass from the person of the creditor to him who pays for the others. For it is as it were a sale which the creditor makes to him of his rights. And if the creditor refuses the substitution, he who pays the debt may procure an order for it from the judge.\*

\* L. 11, *C. de fidejuss.*; — l. 39, *D. eod.*; — § 4, *Inst. eod.*; — l. 17, *D. eod.*; — l. 36, *D. eod.*; — l. 41, § 1, *eod.* See the sixth article of the second section.

This substitution of the surety to the creditor for recovering the shares of his fellow-sureties, is a third benefit granted to sureties. So that sureties have three benefits which lessen their engagement and facilitate their relief. The first is the benefit of discussion, explained in the first article of the second section. The second is the benefit of division, explained in the sixth article of the same section. And the third is this benefit of the cession of the rights of the creditor, explained in this article. The effect of the first benefit of discussion is, that the surety cannot be sued till after the goods of the principal debtor have been discussed. The effect of the second benefit of division is, that, when there are several sureties for one and the same debt, each of them can only be sued for his own share, if the others are able to pay; but if any of them be insolvent, or their obligation be found to be null, or be liable to be rescinded, their shares will be thrown upon the others, as has been said in the sixth article of the second section. And the effect of the third benefit of the cession of the rights of the creditor is, that the surety who pays the creditor recovers from every one of the other sureties their proportions of what he has paid.

We are to understand the use of the benefits of discussion and division only in favor of those who have not renounced them. For if they have renounced them, they are, with regard to the creditor, in the same condition as the debtor. See the third article of the first section of the *Solidity*, &c.



## II.

1888. *Fellow-Sureties answer for one another.*—It is an engagement of sureties among themselves, that, if there be several sureties for one and the same debtor, and there be one of them that is insolvent, or whose obligation is null or liable to be rescinded, every one of the others ought to bear his proportion of the share of the surety who is insolvent,<sup>b</sup> or whose obligation does not subsist.<sup>c</sup> For they are all of them sureties for the whole debt.<sup>d</sup>

## SECTION V.

HOW THE ENGAGEMENT OF SURETIES ENDS, OR IS ANNULLED.

## ART. I.

1889. *There can be no Surety of an Obligation that is Unlawful.*—If, in the principal obligation, there is any essential vice which may annul it, as if it has been contracted by force, if it is contrary to law or to good manners, if it is founded only on a fraud, or on some error which may suffice to annul it; in all these cases the obligation of the surety is likewise annulled.<sup>a</sup> For no one can take surety for validating engagements that are vicious in themselves.

## II.

1890. *The Exception which the Principal Debtor has on Account of his own Person does not discharge the Surety.*—If the principal obligation was annulled only because of some personal exception which the principal debtor had, as if he were a minor, who, in consideration of his being under age, got himself relieved from an engagement by which he suffered some prejudice, and there had been no fraud on the creditor's part, the restitution of the minor would have indeed this effect, that it would annul his obligation to the creditor, and his engagement to save harmless his surety, if he desired to be relieved from it. But the said restitution of the minor would not in the least invalidate the surety's

<sup>b</sup> L. 26, D. de fidejuss.

<sup>c</sup> L. 48, D. de fidejuss.

<sup>d</sup> See the sixth article of the second section

<sup>a</sup> L. 7, § 1, D. de except;—L. 16, D. de fidejuss. See an example of a surety for an engagement contrary to good manners, Nov. 51, in *prefat.* V. II 46 et 56, D. de fidejuss.

obligation to the creditor.<sup>b</sup> For it was only to make good the obligation of the minor in case he should be relieved from it on account of his age, that the creditor took the additional security of a surety.

### III.

1891. *Fraud of the Creditor with Regard to the Surety.* — If besides the personal exception which might be a sufficient ground for annulling the obligation of the principal debtor, without invalidating that of the surety, there was any fraud on the part of the creditor, whether in the business which was the subject-matter of the obligation, or in the manner of engaging the surety, the obligation of this surety would be annulled. Thus, for example, if one who is willing to lend money to a minor upon security gives to the person who is to become surety for the minor false proofs of his being of age, the obligation of the surety will be annulled.<sup>c</sup>

### IV.

1892. *Circumstances which may render the Obligation of the Surety Null or Valid.* — In all the cases where the principal obligation is liable to be annulled, it is by the circumstances that we are to judge whether the obligation of the surety will subsist or not. Thus, the surety of a minor remains bound in the case of the eleventh article of the first section. And, on the contrary, he is discharged in the case of the third article of this section. Thus, when the obligation has for its cause some commerce or some disposition prohibited by law, as if he who has a mind to give something to a person, to whom it is prohibited by some law or custom to give any thing, makes a fictitious contract for the benefit of the said person, or of a third person who lends his name for that purpose, and he adds to the said contract the security of a surety, the obligation of the surety will be without effect, as well as that of the principal debtor. Thus, in general, to judge of the validity or invalidity of the engagement of the surety, it is necessary to consider the quality of the principal obligation, whether it be lawful or unlawful; the sincerity or disingenuity of the parties; the motive which has induced the creditor to take an additional security, as if it was because the obligation was unlaw-

<sup>a</sup> L. 1, *C. de fidejuss. min.* See the two following articles, and the tenth and eleventh articles of the first section.

<sup>b</sup> L. 2, *C. de fidejuss. min.*

ful; or only to supply the insolvency or incapacity of the principal debtor, as if he were a minor, who, because of his minority, could not validly oblige himself, although the obligation were not unlawful in its own nature; if he who is bound as surety for another has voluntarily offered himself, and engaged the creditor to accept of him, or if he has been engaged by any unfair dealing on the part of the creditor; and it is by these circumstances, and others of the like nature, that we are to judge of the effect which the obligation of the surety ought to have.<sup>d</sup>

## V.

1893. *The Surety is discharged if the Obligation does not subsist any more.* — If the debtor annuls his obligation, either by payment, or by some other way that discharges him, as if, the matter being referred to his oath, he swears that he has paid the debt, or that he did not owe any thing, if he is discharged by a sentence, by a transaction, or other covenant with the creditor; in all these cases, the engagement of the surety is annulled. For he was obliged only to pay what should be due.<sup>e</sup>

## VI.

1894. *Or if it is innovated.* — If the debt is innovated between the creditor and the debtor, without the surety's obliging himself anew, his obligation does not subsist any longer. Thus, he who was creditor for the price of a sale, and who had a surety bound for it, having given an acquittance thereof, and having taken from the buyer alone his bond, as for money lent, cannot after that demand any thing of the surety. For although what he had promised to pay be not acquitted, and the debtor remains obliged for a debt to which the sale had given rise, and for which the said surety had engaged himself, yet the creditor having extinguished the first obligation, that of the surety, which was only an accessory to the other, is also extinct.<sup>f</sup>

## VII.

1895. *The Surety in a Lease is not bound upon the Renewal of the Lease.* — If, a former obligation being expired, the debtor

<sup>d</sup> L. 7, § 1, *D. de except. præs. et præjud.*; — l. 46, *D. de fidejuss.*; — l. 35, *cod.*; — l. 7, § 4, *cod.*; — l. 13, *D. de min.*

<sup>e</sup> L. 2, *C. de fidejuss. tut. vel cur.*; — l. 7, § 1, *D. de except.*; — l. 68, § 2, *D. de fidejuss.*  
See the eighth article of the second section.

<sup>f</sup> L. 69, *D. de fidejuss.*; — l. 4, *C. cod.*

has renewed it by a second, he who was surety for the first obligation will not be so for the second, unless he obliges himself anew. Thus, he who renews with his farmer a lease that is expired, either by granting him a new lease, or by a tacit continuance of the former, will not have him engaged as a surety who was bound for the first lease, unless he obliges himself anew. For it is another obligation.<sup>s</sup>

### VIII.

1896. *If the Debtor succeeds to the Creditor, or the Creditor to the Debtor.* — If the creditor becomes heir or executor to the debtor, or the debtor to the creditor, the confusion which is made in the person of the said heir or executor, of the qualities of creditor and debtor, makes that the obligation does not subsist any more; and this confusion annuls likewise the obligation of the surety. For he cannot owe to the heir or executor a debt against which the heir or executor himself is bound to indemnify him. And there is no longer either debt or debtor.<sup>b</sup>

### IX.

1897. *If the Creditor or Debtor succeeds to the Surety, or the Surety to any one of them.* — If it happens that the debtor or creditor be heir or executor to the surety, or that the surety succeed in that quality to one or other of them, in all these cases there arise different confusions of the qualities of debtor, creditor, and surety, every one of which annuls the engagement of the surety. For if he succeeds to the debtor, he himself becomes principal debtor, and consequently ceases to be surety. And if he succeeds to the creditor, he is no longer bound, seeing he cannot be bound to himself. But if it is the creditor that succeeds to the surety, he will not be bound to himself, but will retain only his right against the debtor. And lastly, if it is the debtor that succeeds to the surety, there remains no longer any suretyship, but only a principal obligation in the person of the debtor. And he could not even plead the exceptions which the surety may have had to allege in his own person; as if he was, for example, a minor.<sup>1</sup>

<sup>s</sup> L. 13, § 11, D. locat.; — l. 7, C. cod.

<sup>b</sup> L. 38, § 1, D. de fidejuss.; — l. 21, § 3, cod.; — §. l. 71, cod.

<sup>1</sup> L. 14, D. de fidejuss.; — l. 71, in f. princ. D. cod.; — l. 5, D. de fidejuss.

## X.

1898. *The Creditor's Pursuit of one of the Fellow-Sureties does not discharge the others.*— Since the engagement of the fellow-sureties does not cease to subsist, although the creditor sues one of them before he brings his action against the others; therefore when there are several sureties for one and the same debt, the suit which the creditor commences against one of them does not hinder him from bringing his action afterwards against the others.<sup>1</sup>

## XI.

1899. *The Surety for the Delivery of a Thing that perishes.*— Although the obligation of him who is bound to give or restore a thing is annulled if the thing perishes by an accident, and the surety, if there was any, is no longer obliged; yet nevertheless, if the thing does not perish till after the debtor has been in fault for not delivering it, as if a seller does not deliver what he has sold, or if one does not restore what he has hired or borrowed, his obligation continues to subsist, and makes that of the surety to subsist likewise.<sup>m</sup> For he ought to answer for the act of the person for whom he engaged himself.

## TITLE V.

## OF INTEREST, COSTS AND DAMAGES, AND RESTITUTION OF FRUITS.

1900. *Of the several Sorts of Damages, and of their Causes.*— It is a natural consequence of all the kinds of particular engagements, and of the general engagement to do wrong to nobody, that they who cause any damage, whether it be by contravening some engagement or failing in the performance of it, are obliged to repair the damage which they have done.

1901. All the sorts of damages, whatever cause they may proceed from, may be reduced to two kinds. One is of the visible damages caused by those who occasion the loss or destruction

<sup>1</sup> L. 28, C. de fidejuss.

<sup>m</sup> L. 58, § 1, D. de fidejuss. See the ninth article of the third section of *Covenants*, and the third article of the seventh section of the *Contract of Sale*.

of some thing, or who damnify it; as he does who, having borrowed a horse, loses him or lames him; or he who turns his cattle a grazing into the field of another person, who does not owe him that service. The other kind is of the damages caused by those who, without destroying or damaging any thing, give occasion to some loss of another nature. As if he who owes a sum of money does not pay it at the term, if he who sells fails to deliver the thing sold, if he who undertakes a work does not perform it.

1902. We may distinguish damages by another view, according to the intention of those who cause them. Some are the effects of a bad design, as of a crime, of an offence, of a cheat: and others happen without any bad design in the person who is accountable for them; but barely either out of negligence, or through some fault, or even through an inability to perform some engagement.

1903. Of what nature soever the damage be, and from what cause soever it may proceed, he who is answerable for it ought to repair it by an amends proportionable either to his fault, or to his offence, or other cause on his part, and to the loss which has happened thereby, according to the rules which shall be explained in this title. Before we enter on the explanation of these rules, it is necessary to make here some reflections on the principles on which they depend, the knowledge whereof may make the use of these rules more easy and more profitable in the several cases where it is necessary to apply them.

1904. *Difference between Interest, and Costs and Damages.*—All the sorts of reparations of damage are reduced to two kinds: one which is called barely interest, and the other costs and damages. Interest is the reparation or satisfaction which he who owes a sum of money is bound to make to his creditor for the damage which he does him by not paying him the money he owes him; as if he who has borrowed a sum of money does not pay it at the term; if a purchaser does not pay the price of the sale; if a tenant does not pay the rent of the house which he hires, or a farmer the rent of his farm. All the other reparations of damage, of what nature soever the damage may be, are called costs and damages; as if a tenant neglect to make the repairs which he is bound to by his lease, and the house be thereby damaged; if a partner neglects to take care of a thing belonging to all the partners in common, with which he is intrusted, and the same perishes; if a tutor fails to gather in the debts that are owing to his minor,

and they be lost; if a seller does not warrant the purchaser against an eviction. The same name of costs and damages is given likewise to the reparations which are due from those who have caused any damage by a crime or an offence. And in crimes, the satisfaction for the damage is called the civil interest, which is the same thing with costs and damages; but this term civil interest is made use of to distinguish this reparation of the damage from the other penalties which are inflicted for crimes.

1905. There is this difference by the law and by our usage between the damages which arise from the bare default of paying a sum of money that is due, and the damages which have other causes, that all the damages which those may suffer who are not paid a sum of money at the term of payment are all uniform, and fixed by the law to a certain portion of the sum that is due, for the space of a year, and proportionably for a longer or shorter time. Thus, we have seen the interest of money at the rate of between eight and nine per cent, that is, the twelfth part of the principal sum; then betwixt six and seven per cent; then reduced lower, to between five and six; and at present it is fixed at five per cent. But the other sorts of damages are indefinite, and are extended or limited differently by the prudence of the judge, to more or less, according to the nature of the act and the circumstances. Thus, whoever owes money, whether on the score of loan or for other causes, owes for all manner of damage, if he does not pay it, only the interest that is settled by law. But a tenant who fails to make the repairs which his lease obliges him to, an undertaker who fails to perform the work which he has undertaken to do, or who does it ill; a seller who does not deliver the thing which he has sold, or who, having delivered it, does not warrant it against an eviction; owe indefinitely the damages which may ensue upon their not performing their engagement; and they are regulated differently according to the diversity of the losses which happen, the quality of the acts which occasion them, and the other circumstances.

1906. *Why the Interest of Money is fixed, and Costs and Damages undetermined.* — This difference between the interest settled by law for sums of money owing, and those reparations of damage of which the estimation is undetermined, hath its foundation in the differences which are between the failing to pay a sum of money that is owing, and the other various causes which give occasion to some damage.

1907. We may remark, as the first and most sensible of these differences, that, among all the causes which may give occasion to a reparation of damages, there is none so frequent as the default of paying a sum of money that is due, and that there is likewise none from whence there arises so great a variety of damages to be repaired; so that, if every creditor had a right to have the damage estimated which he may suffer for want of the money that was due to him, each demand of payment would be attended with an infinite number of discussions of the different damages which the creditors might allege they had sustained. One would pretend that, for want of payment, his goods had been seized and sold, and he by that means ruined; another would allege that his house had fallen down for want of money to repair it; a merchant would pretend a considerable loss in his trade; and according as the different wants and conjunctures should diversify the events, every one would distinguish himself by the circumstances of his loss and of his damage.

1908. Had there, therefore, been no other cause for fixing by law a uniform reparation for all the sorts of damages which may arise from the non-payment of sums of money, besides the consideration of retrenching this infinite multitude of different liquidations and lawsuits which would follow thereupon, we could not well be without such a regulation. But another difference, which distinguishes the engagement of debtors of sums of money from all other sorts of engagements, is a natural cause, which makes this regulation to be as equitable in itself as it is useful to the public.

1909. This difference consists in this, that the damages which proceed from other causes than the non-payment of money arise from some engagement which distinguishes and points out the nature of the damage which one may be accountable for if he fails to perform his engagement, which is not to be met with in the engagement of those who owe sums of money. Thus, for example, when a tenant obliges himself to the small repairs of a house which he rents, his engagement points out to him precisely that he obliges himself to those repairs, in order to preserve the house in the good condition in which it is at the time it is let to him, and that consequently, if he fails to make the said repairs, he will be liable for the damage that shall ensue thereupon, and be obliged to restore the house in the same condition in which it was at the time when he hired it. Thus, when an undertaker of a building obliges himself to make it such as it ought to be according to his



bargain, his engagement tells him the quality which the work he undertakes ought to be of; that he is to answer for the defects of the materials, if by his contract he is bound to furnish them, and for the faults of his conduct and workmanship. Thus, he who is engaged in a guardianship cannot be ignorant that his engagement obliges him to an exact and faithful administration, and that if he neglects either to call in the debts, to cultivate the lands, or to repair the houses, he will be accountable for the consequences of his negligence. And it is the same thing in all the other sorts of engagements, excepting that to pay the money one owes. Thus, in these engagements the deed of the person who is bound to repair the damage is a cause which determines precisely the quality of the reparation which he may be liable to make. But the engagement of those who owe sums of money has no relation to any kind of particular and determined damage that is to happen if they do not pay, and does not mark whether it will be the ruin of a building, or a bankruptcy, or any other particular damage of a thousand that may happen. But the quality of this damage will depend on the particular circumstances in which the creditor who is not paid at the term shall find himself. And as the wants are diversified according to the differences of the events and conjunctures in which those persons happen to be who are disappointed of what is due to them, so the damages which happen to them from thence are also of natures altogether different; and they are unforeseen, as well as the wants from whence they may proceed.

1910. This infinite variety of damages which may ensue upon the non-payment of a sum of money is an effect of the nature of money, which of itself having no particular and determined use, as all other sorts of things have, but having this general use of making the price of all things that may be valued, it is to every person instead of those things which he stands in need of. Thus, the use of money being different according to the diverse ways of employing it, and according to the particular occasions which one may have for it, the damages which may happen to those who are not paid by their debtors are different, likewise, according to the diversity of the uses to which they intended to put the money that was due to them.

1911. It follows from this difference between the engagement of those who are indebted in sums of money and all other sorts of engagements, that, as in all other engagements the persons who are obliged may distinguish, by the nature of their obligation,

what the damage will be for which they will be accountable in case they do not perform their engagement, and that this knowledge makes them foresee precisely what they oblige themselves to, and what the damages which they shall cause may amount to, one finds in every one of the said engagements a just foundation whereby to distinguish the reparation that may be due, and to ascertain the same. But as the bare quality of the engagement of those who owe money does not distinguish their condition, and does not point out to them precisely what may be the damage that may ensue upon their failing to make payment, and as besides they are all obliged only to one and the same thing, which is to pay a sum of money, their engagement is not a principle by which we can distinguish the reparations to which they may be liable, nor does it oblige them differently to the respective damages which the creditors may suffer, according to the diversity of the events. But these events are, with respect to the debtors, as accidents which they could not foresee, and which their obligation did not comprehend.

1912. It follows from this difference between the engagement of persons who are indebted for sums of money, and all the other sorts of engagements, that in one and the same contract, of the nature of those which are binding on both sides, it may happen, and does often so fall out, that although the engagement of the contractors be reciprocal, that is, that each of them on his part be bound to the other, yet their engagements are neither alike in their nature nor equal in their estimation, but are of different natures; and the same contract limits the engagement of one of the contractors to the bare interest of a sum of money, if it is not paid at the term of payment, whilst the engagement of the other party is indefinite, and may be extended to damages of a far greater value. Thus, in a contract of sale, the obligation of the seller informs him that he is obliged to deliver the thing sold, and to warrant it with the qualities which it ought to have; which lets him know that, if the thing sold is not delivered, if it has not those qualities which it ought to have, if it is evicted from the purchaser, he must answer for the damages which shall ensue thereupon, according to the rules explained in the second, tenth, and eleventh sections of the *Contract of Sale*. But the same contract of sale doth not form any such engagement on the part of the buyer. For it does not point out to him what damage the seller may sustain for want of his money, whether he shall suffer any at

all, or whether, on the contrary, it may not endanger the loss of his trade and commerce; whether such a disappointment may not occasion his goods to be seized and sold; or what other damage the seller may sustain thereby. Thus, whereas with regard to the seller, the events which subject him to damages having been foreseen, he cannot say, when they happen to the buyer, that they are accidents which he could not foresee, and for which he ought not to be answerable; whereas the buyer, on the contrary, may say, in respect of the different losses which may happen to the seller, that not any one of them has been foreseen, and that therefore those which happen are, with regard to him, accidents which his obligation did not point out to him; and he may allege that, if the seller had proposed that, in case such accidents should happen, the buyer should be answerable for them, he would not have bought upon those terms, nor exposed himself to the danger of such consequences, in case of failure to pay the price of the thing sold.

1913. It is easy to perceive the same difference of engagements in one and the same contract, in leases of lands and houses, and in other sorts of engagements, even those that are entered into without covenant. But we must not draw this consequence from the difference we see between the engagement of one party and that of the other, that those who owe only money are not liable to damages if they fail in their payment, under pretext that their engagement does not precisely point out to them what will be the damage that will ensue upon their non-payment. For it being certain that they do wrong to their creditors by not paying them, it is just that they should make them amends; and in order to settle this reparation of damages, it was necessary to have a fixed rule, that might be common to all debtors in sums of money, and that should be founded on other principles than those which regulate the damages of all other kinds. And there could not have been made a more equitable regulation in this matter than what has been found out by fixing the reparation of damages which the debtor of a sum is liable to, in case he fails to pay it at the term, to a certain portion of the sum due; for this reparation is founded on two principles which are perfectly just and equitable. One is, that all debtors for sums of money being under the same engagement, and owing only one thing of the same kind, they are obliged only to the same reparation of damages. And the other is, that, it being necessary to fix this reparation of dam-

ages upon one and the same foot, it could not be made more just and more certain than by fixing it at the value of the common profits that may be made of money by a lawful commerce. And this is what has been done by comparing money, which makes the price of all things, to those things which produce naturally some profit, and by regulating the profit of a sum of money according to the profit that is made of a thing of like value. And seeing the most ordinary and most natural profits are those which lands yield, the reparation of damages which ought to be made to creditors in sums of money, who are not paid at the term of payment, is estimated at the rate of the usual produce or revenue of a piece of land of the same value with the sum that is due. Thus, for example, if the common value of the revenue lands is a French sol, or penny, in the livre, the reparation of damages which will be due from a debtor who owes the sum of a thousand livres which he does not pay, will be of fifty livres a year, which is the revenue that is commonly reaped every year from a piece of ground that may be worth a thousand livres. And it is upon the same foot that annuities are regulated, where he who purchases an annuity out of the estate of his debtor does nothing else but purchase a yearly revenue in money, which may be of the same value with the ordinary revenue that may be made of a piece of ground which might be purchased for the money he lays out on the annuity. But since the value of the revenue of lands is subject to changes, and the same rises or falls according to the scarcity or plenty of money, and for other causes which render it necessary to make different estimations, according to the changes which the times may produce, the laws regulate differently the standard of the interest of money and that of annuities, according as those changes may require. Thus, we have seen in France, as has been already observed, annuities and interest of money reduced from ten to between eight and nine per cent, and lowered by degrees to five in the hundred, which is the present standard.

1914. *Exceptions to the Rule which fixes the Interest of Money.*

— All these considerations, which justify the rule by which the interest of sums of money is fixed at a certain portion of the principal, are to be understood only of the cases where the debtors cannot be charged with any blame, that may deserve a reparation of another kind. And this rule does not justify the debtors who, being able to pay, are unwilling to do it; and much less does it justify those who, rather than pay their debts, hoard up their

money, and let poor families starve for want of their own. This sort of iniquity is of another kind than the bare delay of debtors who have not wherewithal to pay their debts at the time appointed; and this hardship would deserve punishments of a severer kind than a bare reparation proportioned to the damages which it may occasion. . It was for this reason that the ordinance of Orleans in France required the judges to condemn those who should be found in arrears for wages due to laborers and workmen, to pay the double of what they owed.\* And although this ordinance be not observed, and such unjust debtors go unpunished, yet we thought fit to insert this remark to show that this impunity is not agreeable to the spirit of the law, and that there are occasions in which the crying injustice of those debtors might be punished, agreeably to the intention of the law.

1915. We must also except from this rule, which fixes the interest of sums of money that are owing, bankers who do not punctually answer bills of exchange. For this kind of obligation hath particular characters which distinguish it, as to which the reader must consult what has been said thereof in the fourth section of the title of *Persons who drive any Public Trade, &c.*, where we see that the engagement in bills of exchange is not only to pay a sum, but implies the circumstance of remitting the money from one place to another, which renders the party who fails in the performance of his engagement liable to other damages besides the bare delay of paying what he owes. And this matter is regulated by the ordinance of 1673, in the title of *Bills of Exchange*, and in that of *The Interest of Change and Rechange*.<sup>b</sup>

1916. Neither must we comprehend under this rule the engagement of debtors to their sureties.<sup>c</sup> For it is not money that debtors owe to their sureties; but they are bound to save them harmless from the damages which they may sustain on the part of the creditor if he is not paid; as if he distrains their goods. Thus, the indemnity which the debtor owes to his surety obliges him to make good the damages which he may have suffered by a seizure of his goods, at the instance of the creditor.

1917. *Other Remarks concerning Damages.* — After having made this distinction between the interest of money and damages, it is necessary to observe as to damages, that it is by two views that we may judge whether there be any at all due, and that we ought

\* Article 60 of the ordinance of Orleans.

<sup>b</sup> V. tit. D. de eo quod certo loco.

to regulate them. For we ought first of all to consider the quality of the act from whence the damage proceeded, as if it is a crime, an offence, a cheat: or if it is barely some fault, some neglect, or an involuntary non-performance of an engagement. For, according to these differences, the reparation of damages may be greater or lesser, as we shall see hereafter. And we ought also to consider the events which have ensued upon the said act, and whether they be such as ought to be imputed to him who is author of the act, or whether there be other causes mixed with it, so that all those consequences ought not to be imputed to him.

1918. As to what concerns the quality of the act of the person from whom a reparation of damages is demanded, the question is only to know if there be on his part any design to hurt, or any knavery, or if there be no such thing. And seeing it is an easy matter to know it, either by the act itself, or by the circumstances, without any help of rules, it is sufficient to remark barely here, that it is by this first view that we ought to examine the questions concerning damages.

1919. As to the events which may ensue upon the act of him who is charged with the damage, there may arise difficulties about them, which may very well deserve rules for deciding them. For it is to be observed, that it often happens that there arises from one only act a chain of consequences and events which cause divers damages, whether it be that those events have been the immediate consequences of the said act, so as that it may be averred that it was the real and only cause of them, or that they may be ascribed to other causes which have no dependence on the said act, but to which that act had barely given occasion, or that they happen to be joined with the said act by some accidents. And according to these differences of events, there may be a difference in the damages, so that some of them may be justly imputed to the author of the act, and it may not be reasonable to charge him with others.

1920. We shall be able to judge of these several sorts of events, and of the regard which ought to be had to them in questions relating to damages, by the two following examples. And we shall see likewise, at the same time, the divers effects which the act of the person who is answerable for the damage ought to have in these questions, according to the quality of the act, and the motive thereof.

1921. We may suppose for the first case, that a merchant hav-

ing hired a shop for a fair, in a town which was not the place of his usual residence, and that, having carried thither his merchandise, it happens that he who had let him the shop is himself turned out of the possession thereof, either by an eviction, or by a power of redemption, or by a seizure of his estate, and that the shop is let to others by the authority of a court of justice, so that the person who let it to the merchant is not able to perform his contract, and that therefore the merchant finds himself under a necessity of hiring another shop like to the former, but at a much dearer rate; or that, not being able to get another shop, he loses his market, and, for want of the assistance which he expected from the sale of his goods, to pay a pressing debt, he becomes bankrupt. We see in this case many damages which may follow from these different events, which it is necessary to distinguish, in order to discern between those which are in such a manner a consequence of the non-performance of the covenants of the lease, that they ought to be imputed to him who was bound to give the shop, and the events which may proceed from some other cause, jointly with that of the non-performance of the lease, and for which it may not be reasonable to make the lessor of the shop accountable.

1922. We see in the first of these events, where the merchant has hired another shop, that all the damage consists in his having hired it at a dearer rate; and that, the said damage having for its only cause the non-performance of the first lease, he ought to be indemnified as to what it has cost him more to get this other shop. But in the second case, where the merchant could not get another shop, we see that he sustains three different sorts of damages; that of the charges of transporting his merchandise thither and back again, that of the loss of the profit which he would have made by the sale of his goods, and that of the bankruptcy.

1923. The loss of the charges for the carriage of the goods is a necessary consequence of the non-performance of the contract for letting the shop; and seeing this loss proceeds from no other cause, one may impute it to him who let the shop.

1924. The loss of the profit which might have been made by the sale of the goods is also a consequence of this non-performance of the lease of the shop; but this loss is not of the same nature with that of the charges of the carriage. For whereas the loss by the carriage of the goods may be easily estimated, and is an effect which hath for its certain and precise cause the non-performance of the lease, the loss of this profit which might have been made by



the sale of the goods cannot be so easily known; for this knowledge depends on future and uncertain events. It is well known that the profit which this merchant might make at the fair did not depend barely on his having a shop or booth in it; but it might happen, either because of the great quantity of goods of the same kind with his, or because of the scarcity of money and the small number of buyers, or through other causes, that there would be but little profit to be made, or perhaps none at all; and it might happen, likewise, that because of the scarcity of those goods, the plenty of money, and the great number of buyers, the profit would have been great. So that it cannot be known exactly what this loss may have amounted to. But even although it could be known exactly what quantity of goods this merchant might have been able to sell, and what gain he might have made, judging of his profit by that which other dealers in the same commodity had made; yet it would not be reasonable to charge all that loss on him who ought to have furnished the shop. For besides that this merchant, having still the goods in his possession, might yet make profit by them, and perhaps more than he would have done at the fair for which the shop was hired, nobody knew any thing at that time of the events which might make the profit either greater or lesser, or which might occasion, perhaps, that there would be no profit at all, or that there would be loss, instead of gain. So that they did not reckon that the penalty for the non-performance of the lease should amount to the value of the greatest gain that this merchant could hope for from a good market. But, because he who has failed to deliver the shop ought to suffer some punishment for his not performing his bargain, it is just to award, under all these views, some reparation of damages, and to regulate the same according to the circumstances.

1925. As to the third damage, which is that of the bankruptcy, this unforeseen event having for its particular cause the condition in which the affairs of the said merchant were at that time, it is an accident with regard to him who had promised the shop, and which consequently ought not to be laid to his charge.

1926. We may suppose, for a second case, that a merchant having agreed with the master of a manufacture for a certain quantity of goods, to be delivered to him on a certain day, that they might be embarked on board a fleet appointed to sail at that time, and that the merchant having paid beforehand the price of the said goods, or a part thereof, and being come with carriages to receive



them, they are not delivered to him. We see also in this case several damages;—the charges of the carriages, the loss of the profit which this merchant might hope to have made by the sale of those goods in the place whither he purposed to send them, and that of the gain which he might have been able to make upon other goods which he would have bought up in the same place, and likewise the interest of the money which he advanced. The charges of the carriages are due to him without any manner of difficulty, as well as the interest of the money which he advanced. The profit which he might hope to make upon the goods which he intended to buy up with the produce of his outward-bound cargo is too remote from the act of the person who has failed to deliver the goods for the embarkation, and ought not to be imputed to him. And as for the profit which might have been made by those goods, if they had been embarked, we must consider, on the one hand, that, for want of having had those goods delivered to him, the merchant is deprived of the hopes of the gain which he might have expected, and that he who was bound to deliver them, having failed in the performance of his engagement to do it, ought to bear the punishment of his non-performance of his promise by making some reparation of the damage. And on the other hand, likewise, we ought to consider that this gain was not certain; that the ship might perish by shipwreck, or fall into the hands of pirates or enemies; and that other accidents might have prevented the making any profit at all. So that, in this uncertainty of events, it would not be just that the reparation of damages should be equal to the gain which one might hope for from a success altogether favorable. But it ought to depend on the prudence of the judge to settle and to moderate some reparation of damages, according to the circumstances and the particular usages observed in such cases, if there be any.

1927. We see by these examples, and it is easy to remark in others,\* of what consequence it is to distinguish the events, in order to know wherein the reparation of damages ought to consist. And it remains that we should consider the divers effects which the different qualities of the acts from whence they proceed may have in questions relating to damages. Thus, for example, in

\* See the seventeenth and eighteenth articles of the second section of the *Contract of Sale*, the eighth article of the third section of *Letting and Hiring*, the twelfth, thirteenth, and fourteenth articles of the fourth section of *Partnership*, and the sixth article of the second section of *Proxies*.

the first case of the non-performance of the lease of the shop promised to the merchant, if we suppose that, instead of an eviction or a seizure, which may have hindered the execution of the lease, it had happened that the shop was burned by a fire communicated from the neighbouring house, or that on the very day of the fair the said shop had been set apart for some public office by the authority of justice, and that the proprietor had not time nor opportunity to give notice to the merchant of the said changes; seeing the said changes would be accidents which had happened without any fault on his part, he would not be liable to any reparation of damages, by the general rule that no body is to answer for accidents, except there be some fault on his part.<sup>d</sup> But if we suppose that he who lets the shop to this merchant did afterwards let it to another, and put him into possession of it, that he might have a greater rent for it; this knavery will subject the owner of the shop to a much greater reparation of damages, than if the non-performance of the lease had been occasioned only by a seizure or eviction of the shop. For whereas, in the case of an eviction or seizure, we ought to moderate the reparation that is to be made to the merchant for his loss in being disappointed of the sale of his goods, according to the remarks which have been made, his knavish dealing cuts off all pretensions to any mitigation of the damages; and the sentence which condemns the party in damages ought to have the utmost extent that the rigor of the law can give it, because the knavery implies a will and intention to do all the hurt that is possible.

1928. We may conclude from all these remarks, that, in all the cases where the question is to know if any damages are due, and in what they consist, it is necessary to consider the quality of the act which has occasioned the damage, the share which the person who is charged with the damage may have had in the act, his intention, whether the said act happened by accident, what have been the consequences of it, either immediate or more remote, and which may have proceeded from other causes. And it is by all these views, and by a consideration of the particular circumstances of every case, that the judges ought, according to their prudence, to decide questions of this nature. As to which it is likewise necessary to observe, that there are cases, in which the consequence of the non-performance of an engagement may be such,

<sup>d</sup> See the ninth article of the third section of *Covenants*.

that, although there were no bad intention on the part of him who has failed to perform his engagement, yet he might deserve, not only to be condemned in a considerable sum of money, for reparation of damages, but also to be punished otherwise; as in the case of those who undertake to furnish arms, provisions, forage, or other things for an army, and who fail in the performance of their contracts. For in contracts of this importance, wherein the public and state is concerned, imprudences and other faults, let them be never so small, are of such consequence that they deserve to be punished with great severity, and are such as may be ranked in the number of crimes, according to the circumstances.

1929. We may add to all these remarks, a distinction which it is necessary to make between two sorts of cases where damages happen that are to be estimated. One is of the cases where the damage is present, and where the reparation may be known, and regulated by a view of the events which have actually happened. And the other is of the cases where the damage is not present, but to come, and depends on future and uncertain events, although it be necessary to regulate the reparation for the damages, before they happen. We may see in one and the same kind of contract an example of each of these two sorts.

1930. If the lease of a farmer, which was only for one year, be interrupted just before harvest, by a change of the proprietor, as if the land was evicted from him who had leased it out, or if he sold it, he ought to make good to the farmer the present loss which he suffers by not being allowed to gather the crop that is on the ground; and it is no hard matter to adjust this reparation of damages, because it appears wherein the loss does consist. But if the lease was for several years, and the same be interrupted from the first or second year, the damages will consist in the loss which the farmer sustains by not enjoying his farm for the remainder of his term. Thus, the estimate of the reparation of damages will depend on the several views of the events which this farmer might have reason to hope for or fear, according to the quality of the fruits or revenues which this farm yielded. It was possible that there might happen hails, frosts, barrenness, a fall in the price of provisions, and other causes of losses; and it might likewise so fall out, that there might be favorable opportunities for the sale of them, and other causes of profit; and, in a word, it might happen that the said farmer would neither have been a gainer nor a loser. But because farmers usually make their bar-

gains so as to be gainers, and that it is even the intention of the proprietors that their farmers should reap some profit, the uncertainty of these events is no reason why a reparation of damages should not be due to this farmer. And all that human reason can do in a case where it is necessary to decree a reparation of damages to be made, and impossible to know what the damage may amount to, is to take a medium of the profits which farmers of such lands may commonly make, adding thereto the considerations which the particular circumstances may deserve; as if the farmer had enjoyed his farm for the greatest part of the time of his lease with a great deal of profit, or a great deal of loss; for in the first case, the reparation of damages ought to be less, and greater in the second: if the said farmer found anywhere else an opportunity of taking much such another farm; or if no such opportunity offered: if he had many years of his lease to come; for in this case one ought not to allow for each year the same reparation of damages as if there remained only one or two years of his lease to run; because the farmer might provide himself of another farm in so long a time, and he might have many more casualties to fear. And we ought also to consider the cause of the interruption of the lease; if it is an eviction that was not foreseen, a voluntary sale, or an accident: for according to the cause, either there is no reparation due at all, as if the land was carried away by a flood; or it might be lesser or greater, according as the proprietor had more or less share in it.

1931. It is by all these views, and others of the like nature, that we may regulate the reparations of damages of this kind. Which may be reduced to the remark already made, that the reparation of damages ought to be regulated by a view of the cause of the damage, and of the events which are consequences of it.

1932. Hitherto we have said nothing of the vulgar distinction in the matter of damages between those which are due for a damage or loss that one suffers by a diminution of his present goods, which he is actually possessed of, and those which are due on the account of a gain that ceases. For it will be easier to distinguish these two sorts of damages after the other distinctions that have been remarked. Thus, for example, in the case of the merchant to whom the shop had been let, we see that the loss of the charges of transporting his goods is of the first sort, and the loss of the profit which he might have made by the sale of them is of the second; as well as that of the farmer, whose lease is in-

terrputed. And as to the difference that may be between these two sorts of damages, in what regards the application of the several reflections above mentioned, both to the one sort and the other, it is easy to distinguish them aright. And one will be able to judge, both by these reflections, and by the rules which shall be explained in this title, of the use that is to be made of them in the several cases of damages of all kinds.

1933. *The Reparations of Damages are regulated either by the Judge or by Skillful Persons.* — We must observe, in the last place, on the subject of the estimate that is to be made of damages, that, in consequence of the remarks already made, this estimate may be settled in two manners, either by the judge himself, or by skillful persons, and this depends on the quality of the damages that are to be estimated. For if they are such as the judge may regulate himself, there is no occasion to call for the assistance of skillful persons; who are not to be employed except in the cases where this estimate depends on some art or profession, or on some facts which it would not be suitable to the function or dignity of the judge to inquire into. We shall explain these sorts of damages by two examples.

1934. If he who has purchased an estate is evicted thereof, and demands for his damages only the fines of alienation which he paid to the lord of the manor, and the charges he had been at for drawing and engrossing the writings, and taking possession of the estate, the judge may by himself regulate these damages, for he may easily see in what they consist. But if it is the damages due by an architect for a faulty building which are to be regulated, this said estimate, which depends on the quality either of the materials or of the work, demands the judgment of persons skilled in those matters.

1935. But if the case be such, that the estimate of the damages depends barely on reflections to be made on the act which has occasioned the damage, and on the events which have been the consequences or effects thereof, in order to distinguish between what ought to come under the reparation, and what not, and that there be nothing besides which requires the judgment of skillful persons; seeing these sorts of reflections are equally consistent with the dignity and function of the judge, he may take cognizance of them, and may regulate by his own prudence the damages of this kind. Thus, the ordinances of France require that the judges themselves shall regulate the damages caused by false im-

prisonments, unjust seizures of goods and executions,\* because the liquidating of these sorts of damages depends on the consideration of the quality and circumstances of the facts which occasion them. Thus, for example, if a creditor causes his debtor to be thrown into jail, when he has no right to use the said constraint, whether it be that his debt does not give him that power, or that the age of his debtor, or some other cause, does make the said imprisonment to be unjust, and the said debtor is a day-laborer, or other person who by his labor maintains his family, which for want of this assistance suffered likewise other losses; it will depend on the prudence of the judge to regulate a reparation, both for the loss of the day's work of this prisoner, and for the other damages, according as the injustice of the said creditor may deserve, upon consideration of the circumstances.

1936. We have judged it necessary to make here all these remarks on the nature and principles of this matter of interest and damages, in order to explain the difficulties which the laws themselves ~~we~~ knowledge to be therein; since we see a law of the Emperor Justinian, in which, to prevent these difficulties and the infinite number of questions that arise from thence, he reduced all the cases where there happen any damages to two kinds. The one is, of those cases where the question is about a certain quantity, or which have their nature fixed and regulated, such as sales and leases, and under this kind he comprehended all contracts. The other kind is, of all the other cases whatsoever, without distinction, whatever might be the cause of the damage.

1937. As for the cases of the first kind, which have their nature fixed, and where the question is concerning a certain quantity, he established it for a rule, that the damages should not exceed the double of the said quantity: and as to all the other cases where there should happen any damages, he ordered that they should be regulated by the prudence of the judge, according to the estimate of the real damage that was sustained.<sup>f</sup>

1938. Seeing this regulation which limits the damages to the double in all contracts, and in the cases where the question is about a certain quantity, and which have their nature fixed and regulated, is a manner of deciding which does not unravel nor resolve the difficulties, and which often would not do justice to

\* Ordinance of Blois, article 145.

<sup>f</sup> *L. un. C. de sent. qua pro eo quod int. prof.*

those who suffer damage, it is therefore not in use with us. For, besides that it does not distinguish between the acts in which there is knavery, and those in which there is none, there is no more reason for lessening or retrenching any thing of the lawful reparation of damages in the cases where the question is about a certain quantity, and in contracts, than there is in the other cases of different natures. Thus, for example, if a tenant of a house who pays only one hundred crowns for the rent of it had so far neglected to make the repairs which he was bound to make, that he had caused a damage exceeding one thousand livres, or if the house had been burnt by his fault, it would not be just that he should be quit for his rent, nay, not for the double, nor even for the triple of it.

1939. It is to be observed, as to this rule of Justinian, which limited thus the damages to the double in all those cases which have been mentioned, that it seems to have been made in imitation of another rule, which ordered that the interest of money lent should never exceed the value of the principal.<sup>a</sup> And whereas this rule concerning the interest of money took place at first only in the cases where the interest actually owing amounted to the value of the principal sum, Justinian extended it to all the cases where the interest paid at different times exceeded the principal sum that was due.<sup>b</sup>

1940. This rule relating to the interest of money may have been made out of hatred to usurious and extravagant interest, which, although tolerated in the Roman law, was little favored; but it is not in use with us in France, except in some places. For, seeing that no interest is adjudged to the creditor, unless the same be demanded, and that it is justly due during the whole time of the delay, it would not be just to make him lose it. Thus, for example, if a merchant or other creditor, having occasion for his money, and not being able to recover payment, after he has obtained judgment for his debt, finds himself obliged to seize upon the effects of his debtor, or to appear for his interest in a seizure already made by other creditors, and the debtor prolongs the suit relating to the said seizure for many years, by appeal, or other ways; it would be contrary to equity that, after twenty years of delay, he should be deprived of the lawful reparation of damages that would be due to him. • •

<sup>a</sup> L. 27, § 1, *C. de usur.*; — Nov. 121, 138, 160.

<sup>b</sup> L. 10, *C. de usur.*; — d. Nov. 121, c. 1.

1941. *Expenses.* — There is also another sort of damages, which is that of expenses due from the person who is cast in a lawsuit; and that consists in the reimbursement of the charges which the person who gains the suit has been at in carrying it on. But, besides this reparation of damages, which the ordinances oblige the judges to decree to all those who gain their lawsuits,<sup>1</sup> there were, in the Roman law, other costs and damages against those whose demands or defences were found to be nothing but injustice and cavil;<sup>1</sup> and the Romans, likewise, made use of this precaution to oblige the plaintiff and defendant, and their advocates, to make oath, at the very beginning of the suit, that it was not out of malice, or for the sake of cavilling, that they carried on the suit, but that they looked upon their cause to be just and well grounded.<sup>2</sup> This oath is not in use with us in France, and it was only a sure occasion of perjury. But the condemnation of those in costs who prosecute or defend ill-grounded lawsuits has been found so just, that Francis the First revived it, having ordained that in all matters, civil and criminal, the costs occasioned by the temerity of him who is cast in the lawsuit should be given against him if they are demanded; and that they should be taxed and moderated by the same judge who decides the lawsuit.<sup>3</sup> But although this ordinance be not at present put in execution, and we very seldom see such condemnations, yet the equity of the rule is not abolished, neither can it be; and the judges are at liberty to observe it on all occasions where the spirit of these laws may require it. •

1942. We shall not treat, under this title, of the matter of expenses, because it is a part of the order observed in judicial proceedings. And as to the costs and damages which may be due from those who prosecute or defend unjust lawsuits, these sorts of costs and damages have no other particular rules than those of the other kinds. And it is sufficient to take notice here of this rule, which shall have its rank in this title, in its proper place.

1943. *Restitution of Fruits.* — There remains still another matter to be considered under this title, which is that of the restitution of fruits. We have added this matter to that of interest and of costs and damages, because the restitution of fruits is a kind of reparation of damages, which is due from him who has un-

<sup>1</sup> See the ordinance of Charles IV. in 1324, of Charles VIII. in 1493, article 50, and the ordinance of 1667, tit. 31, art. 1.

<sup>1</sup> § 1, in *f. Inst. de pœn. ðm. litig.* • <sup>2</sup> *Totò tit. C. de jurejur. propt. cal. dando*

<sup>3</sup> See the ordinance of 1539, art. 88 and 89.



justly enjoyed a land, the enjoyment whereof belonged to another person; and because fruits are the revenue of lands, as interest is that of money, or rather, because the interest of money has been invented after the example of the fruits of the ground, and because interest of money is instead of those fruits, as has been already observed.

## SECTION I.

### OF INTEREST.

1944. AFTER the remarks that have been made in the preamble to this title, on the differences between damages and interest, it is not necessary to explain here what is the subject-matter of this section, and of that which follows. Since it appears clearly enough that the subject-matter of the present section is the reparation of damages which is due from debtors who owe sums of money, and who fail in the payment thereof; and that the matter of the other section comprehends all the other kinds of reparation of damages.

### ART. I.

1945. *Definition of Interest.* — By interest is meant the reparation of damages which the law directs to be made to creditors in sums of money, by debtors who fail to pay what they owe.\*

### II.

1946. *In what it consists.* — The interest which debtors in sums of money owe for default of payment is fixed by the law at a certain

\* L. 32, § 2, *D. de usur.*; — l. 17, § 3, *in fin. cod.* The word *usury*, which we read in these texts, has the same signification in the Roman law as the word *interest* has with us, with this difference, that we take the word *usury* always in evil part, because we give this name only to unlawful interest; such as interest for money lent, as has been explained in the preamble of the title of the *Loan of Money*; and that in the Roman law, which allowed the taking of interest for money lent, and by which it was lawful to covenant for interest upon a simple bond or promissory note for money lent, the word *usury* was not taken in a bad sense, but signifies the interest which the laws allow to be taken for money lent.

We shall not take up time here to explain the principles of the Roman law touching the difference between the contracts which the Romans called *bonæ fidei*, of which mention is made in the first text cited on this article, and those which they termed *stricti juris*. For as to what concerns this distinction in general, it is sufficient to observe what has been said thereof in the twelfth article of the third section of *Covenants*. And as to the relation which that distinction may have to the matter of interest for sums of money lent, the principles thereof shall be explained in this section. See the following article.

proportion of so much in the pound, every year, and for more or less in proportion.<sup>b</sup> And this interest is computed on this foot from the moment that the debt beomes due till it is acquitted.

### III.

1947. *When it becomes due.*—Debtors incur the penalty of interest by their delay to pay what they owe,<sup>c</sup> according as the said delay may be imputed to them, and may have that effect; which depends on the nature of the credits and on the circumstances;<sup>d</sup> for in some debts the bare default of paying at the term of payment makes the interest to run for the benefit of the creditor, although he do not demand it; and in other debts this interest is not due except from the time that a demand has been made of the debt in a court of justice, although there was a term fixed for payment, which has expired. We shall be able to judge of this distinction by the rules which follow.

### IV.

1948. *The Purchaser of Lands owes the Interest of the Price.*—The purchaser of a land or tenement who has got possession thereof owes the interest of the price, if he does not pay it at the term of payment, although it be not demanded of him, or if he does not consign it in case the seller refuses to receive it. And with much more reason would the interest be due if there was no term fixed for payment of the price, or if it was agreed that the buyer should pay ready money at the time that the lands should be delivered to him, and he had failed to make payment;<sup>e</sup> for this interest is due for the fruits of the ground. And although the purchaser reaps less profit from the lands than the interest of the price amounts to, or even by some accident the land yields him no revenue at all, he will nevertheless be liable to pay the said interest for the right of enjoyment; and the accidents which deprive him of the enjoyment affect him as proprietor, and do not discharge him of the interest, which ought not to cease nor

<sup>b</sup> L. 1, *D. de usur.*; —l. 37, *D. eod.* This regulation of the interest of money, as well as that of annuities, depends on the edicts which fix it differently according to the different times, as has been observed in the preamble to this title.

<sup>c</sup> L. 17, § 3, *in fin. D. de usur.*

<sup>d</sup> L. 32, *D. de usur.* See the remark upon the fifth article.

<sup>e</sup> L. 2, *C. de usur.*; —l. 18. § 1. *D. de usur.*; —l. 13, § 20, *D. de act. empt. et vend.*; —l. 2, *C. eod.* See the fifth article of the third section of Covenants. As to the consigning of the price, see the eighth article of the second section of Payments.

to be diminished by reason of the said loss, as it would not be augmented were the fruits of never so great value. But this rule hath its use only in the cases where the contract of sale has not otherwise regulated what relates to the interest of the price. For if the contractors have explained their minds touching this matter, their agreement will be instead of a law.

## V.

1949. *Interest after a Demand of the Debt.*—If that which is due proceeds from a cause which in its own nature produces no revenue, the interest thereof will be due only after the debt has been demanded in a court of justice; and in this case it is only this legal demand that makes the delay of payment to be imputed to the debtor.<sup>f</sup> Thus, a debtor who owes a sum of money which he has borrowed, failing to pay it at the time appointed, does not owe interest for it; and the interest will not run but from the time that it has been demanded in a court of justice. Thus, he who has been condemned either in costs<sup>g</sup> or in damages<sup>h</sup> will not owe

<sup>f</sup> *Lite contestatâ usure currunt. L. 35, D. de usur.* The interest, according to our usage, runs not only from the time of contestation of suit, as is said in this law, but from the time of the demand made by the service of the citation. As to which it is necessary to observe, that by contestation of suit is meant that which passes before the judge between the plaintiff, who explains his demand, and the defendant, who contests it. *Lis autem contestari videtur, cum iudex per narrationem negotii causam audire cœperit. L. vii. C. de lit. contest.* Post narrationem negotii propositam, et contradictionem objectam. *L. 14, § 1, C. de jud.* After which the judge makes his first order or assignation in the cause.

This contestation of suit was necessary in the Roman law, to make the defendant guilty of delay. For oftentimes he was ignorant what the person who summoned him had a mind to demand of him. *Deducunt hominem invitum ad iudicem datum, et nihil scientem compellunt facere litis contestationem. Nov. 53, cap. 3.* But by our usage, pursuant to the ordinances which are confirmed by that of 1667, title 2, art. 1, the plaintiff being obliged to explain his cause of action in his citation, it is just that the defendant should be deemed refractory after he is served with the citation, and that he, knowing from the tenor of the citation what is demanded of him, and not complying therewith, should bear the punishment of his backwardness to acquit what he justly owes.

By the ordinance of *Orléans*, art. 60, the interest for sums of money due upon promises or obligations ought to be decreed from the day of the service of the citation.

<sup>g</sup> The interest of costs given to the party who gains the cause is due after a legal demand thereof; and that with much greater reason than the interest of money advanced by one copartner for another, or by those who take care of the affairs of others without their knowledge, or by those who have any thing in common with others. See the eleventh article of the fourth section of *Partnership*, the fifth article of the second section of *those who manage the Affairs of others*, &c., and the fourth article of the second section of *those who chance to have any Thing in common together*.

<sup>h</sup> We have inserted in this article, for one of the examples of the cases where interest

interest for the said sum, till after the said costs and damages have been liquidated, and the creditor has demanded in a court of justice the interest of the sum at which they have been taxed. For in all these cases, the debt not producing interest in its own nature, the debtor does not begin to owe any until the creditor sets forth by his demand the damage which he suffers; and the debtor, on his part, owes then the said interest, as a punishment for his delay of payment.

## VI.

1950. *A Case where one may stipulate Interest, when it would not otherwise be due by the Nature of the Debt.* — There are cases in which one may stipulate interest for sums of money which of their own nature would yield none, and where the agreement makes the interest to be lawful, according to the circumstances which give occasion thereto. Thus, in a sale of movables which would not produce any revenue, the seller may stipulate interest for the price till it be paid; for that interest makes a part of the price. Thus, in a transaction where the pretensions of the parties are regulated at a certain sum of money which one party is to give to the other, it may be covenanted that interest shall be paid for the money, and that even from the day of the transaction, although there be a term fixed for payment thereof.\* For this interest is made a condition of the transaction, either to compensate what he who stipulates the interest may remit in another respect, or for other causes. And such a stipulation may be considered as having the effect of a condemnation by the sentence or decree of a court of justice. For transactions have the same authority as the decrees of a court.<sup>1</sup>

## VII.

1951. *Interest of Marriage Portions.* — The dowry given with a woman in marriage ought of its own nature to produce interest, without a sentence of condemnation; for it is given to the husband to help him to bear the charges of the marriage.<sup>1</sup> This, how-

is not due till after demand thereof, that of damages; which is to be understood of that sort of damages which shall be treated of in the second section, and not of interest, which is the subject of this section, and which cannot produce interest, as shall be shown in the ninth article of this section; whereas damages may produce interest, for the reason which shall be explained in the remarks on the tenth article.

<sup>1</sup> L. 20, C. de transact.

<sup>2</sup> L. ult. § 2, C. de jur. dot. See the second article of the first section of *Dowries*. We have not put down in this article the delay of two years, which is regulated by this law for

ever, is not to be understood of the debtor whose obligation is assigned over to the husband in payment of his wife's portion, for this cession will not change the nature of the debtor's obligation; but it must be understood of the person himself who makes the settlement, such as the father or mother whose daughter is endowed. But if the marriage settlement were conceived in such terms as to make one judge that the intention of the contractors was, that the interest of the sum promised should not be due till after a certain time, it would be necessary to keep to that which appears to be their intention, whether the dowry were promised by the father or mother, or by other persons.

### VIII.

1952. *Interest due from those who turn to their own Profit the Moneys belonging to other Persons.* — Those who retain in their hands moneys belonging to other persons, and who divert them and turn them to their own profit without the consent of those persons, are bound to pay interest, although it be not demanded. For it is an injustice which they do to those whose money they keep; and this interest is due as a satisfaction for the loss which they may occasion, and as a just punishment for their knavish dealing. Thus, when a partner happens to have in his hands moneys belonging to the partnership which he has converted to his own use, and laid out upon his own particular concerns, he ought to pay interest for the same, according to the rule which has been explained in the title of *Partnership*.<sup>m</sup> Thus, a creditor who is overpaid his debt, either by the sale of a pledge, or by the enjoyment of the fruits of the thing which he had in pawn, or otherwise, owes to his debtor interest for what he has received over and above his debt, if he has converted the same to his own proper use.<sup>n</sup>

interest of this kind, seeing our usage does not regulate it in this manner. But according to the circumstances, the judge may grant a reasonable delay for the delivery of such kinds of things, and direct interest to be paid for them if it appear reasonable.

We have not set down here any rule for the interest which the husband owes who does not restore the dowry he had with his wife in movables after the dissolution of the marriage, when there are no children. For the rule of the Roman law, which allowed a year to the husband without obliging him to pay interest, is not in use with us. *V. l. un. § 7, versic. sin autem Cód. de rei ux. act.* As to the dowry consisting in lands and tenements, see the end of the preamble to the title of *Dowries*.

<sup>m</sup> *L. 60, D. pro socio; — l. 1, § 1, D. de usur.* See the fifth article of the fourth section of *Partnership*.

<sup>n</sup> *L. 6, § 1, D. de pign. act.* See the fourth article of the fourth section of *Pawns and Mortgages*.

## IX.

1953. *The Debtor never owes Interest of Interest.*— Whatever delay there may be on the part of the debtor to pay the interest, and whatever may be the cause of it, he is never bound to pay second interest for the interest which he owes; and the creditor cannot accumulate the arrears of interest with the principal sum, in order to make the whole a capital, which may produce interest; but the same will be reduced to the amount of the principal sum which is capable of producing interest.\*

## X.

1954. *But he may owe Interest for other Revenues.*— We must take care, in applying the preceding rule, not to confound with the interest of money the revenues of another nature, such as the rent of a farm, of a house, and others of the like kind. For these sorts of revenues differ from the interest of money, because the interest of money is not a natural revenue,<sup>p</sup> and is only, on the part of the debtor, a punishment which the law inflicts on him for his delay of payment, and on the part of the creditor it is a compensation for the loss which he suffers by lying out of his money; whereas the price of the fruits of the ground and of the rents of a house is a natural revenue, which on the part of the debtor is the value of an enjoyment which he has reaped the benefit of, and on the part of the creditor is a real good, which in his hands makes a capital, as his other goods do. So that the debtor of the rent of a farm, or of a house, justly owes interest for the same, from the time that it has been demanded.†

\* L. 28, C. de usur.

<sup>p</sup> L. 62, D. de rei vind.; — l. 121, D. de verb. sign.

† L. 17, § 4, D. de usur.; — l. 54, D. idat. Annuities are of another nature than the rents of a house or of a farm; for annuities are not the fruits of house or lands, and have for their principal only a sum of money which was the price of the purchase of the annuity. So that the arrears of annuities can never produce interest, nor be accumulated with the principal, in order to make a capital for which the debtor may be obliged to pay new interest.

It is to be remarked on this rule, that as we ought not to confound the fruits of lands and houses with the interest of money, of which we cannot make a capital for producing new interest, so neither ought we to confound with the interest of money the damages which are the subject-matter of the following section. For one may obtain a sentence for the interest of sums of money arising from damages; as if a seller has been condemned in damages on account of an eviction, or an undertaker on the score of a building that is faulty, or other persons, for causes of another nature. In all these cases, the damages having been adjudged and liquidated, if the person to whom they are due does not receive payment of them, he may demand interest for the same in a court of justice. For

## XI.

1955. *How we are to understand the Prohibition of taking Interest of Interest.*—The prohibition of taking interest of interest relates only to the creditor who would take interest for the interest that is still owing by his debtor; for the said interest can never be reckoned to him as a principal sum. But if a third person pays for a debtor interest to his creditor, the same, with regard to this third person, is a principal sum, which he lends to the said debtor; and if he should not receive payment of it at the term, he might demand in a court of justice both the said principal, and the interest thereof.<sup>r</sup>

## XII.

1956. *A Case where he who pays Interest for another cannot demand Interest for that Sum.*—We must except from the preceding rule the creditor who, to secure his own mortgage, acquits the principal sum and interest owing by his debtor to a creditor who is prior to himself. For this second creditor cannot demand from his debtor interest for the sum which he has paid to the first creditor on the score of interest that was due to him; because he paid the same as taking care of his own concerns, and not of the concerns of his debtor; and seeing he paid for the debtor only with this view of securing his own, he could not make the debtor's condition worse.<sup>a</sup>

## XIII.

1957. *A Case where Interest of Interest is due.*—The rule which prohibits the taking interest of interest does not hinder a minor from exacting lawfully from his tutor or guardian, not only interest for the sums arising from the interest which the minor's debtors have paid to the guardian, but also interest of the interest of sums of money which the said guardian may owe upon his own account to his pupil. For all the said interests in the hands of

these damages are a capital which is in the place of a real substance, of which he to whom they are due has been deprived. See the fifth article.

We ought to place in the same rank the costs adjudged by a sentence or decree of a court; and the party to whom they are due may demand interest for them after they have been liquidated, if they are not paid at the time. For it is a capital which is in lieu of the charges which have been laid out upon the lawsuit. See the same fifth article.

<sup>r</sup> Nullo modo usure usurarum a debitoribus exigantur. *L. 28, Cod. de usur.* rule is only for the creditor with respect to his debtor; a debitoribus.

<sup>a</sup> *L. 12, § 6, D. qui pot.* See the sixth article of the sixth section of Mortgages.

tutors and guardians are capitals, which their office obliges them to lay out for the benefit of their pupils. And if they have failed to do it, either through negligence, or because they have laid out the money upon their own particular concerns, they are bound to pay interest for it; that the same may be to the minors instead of the profit which they would have reaped from lands, or houses, or annuities, if their money had been laid out in the purchase of such things.<sup>t</sup>

## XIV.

1958. *Four Causes from whence Interest arises.* — It follows from all the rules which have been explained in this section, that we may reduce to four sorts of causes all those which may give occasion for paying interest of sums of money. For the same may be due, either by the effect of an agreement, as if it has been stipulated in a transaction: or by the nature of the obligation, as the interest of a portion given with a woman in marriage, and that of the price of houses or lands that are sold: or by a law, as that which tutors and guardians are bound to pay to their pupils, for the moneys which they have neglected to lay out for their behoof: or as a punishment of the debtor who defers payment after the creditor has made his demand in a court of justice, both of his principal, and of the interest due for default of payment.<sup>u</sup>

## XV.

\* 1959. *Divers Views by which we may judge whether Interest be due or not.* — We have reduced here to these few articles the rules concerning this matter of interest of money; for besides that in every engagement we have marked under their proper title those in which interest is due, it sufficeth that we have remarked in general the several rules which comprehend the principles on which the decisions of cases of this nature depend, and that we have pointed out the use of them in some examples. To all which we shall add, that, in order to discern aright between the cases where interest is due and those where it is not due, it is necessary to consider in every one what the debt is, as if it is a loan, a sale, or other contract, or what other kind of engagement, and of what

<sup>t</sup> See the twenty-third, twenty-fourth, and twenty-fifth articles of the third section of *Tutors*, with the remarks upon them.

<sup>u</sup> This article is a consequence of all the other articles of this section.



nature it is: the quality of the thing that is due, as if it is a suit of hangings, silver plate, or other things which yield no revenue, except to such as let them out to hire; or if they are things from which the creditor might have drawn some profit, either from the thing itself, or by selling it; that we may judge whether interest be due for the value of the thing, or whether any thing is due for damages: the circumstances of the delay of payment: those of the fair or unfair dealing of the debtor: and the other circumstances which may help us to make a right judgment whether there be ground to condemn the debtor to pay interest, or to discharge him from it.\*

## SECTION II.

### OF DAMAGES.

#### ART. I.

**1960. Definition of Damages.**—By damages is meant here the reparation or satisfaction which is due from those who are answerable for some damage.<sup>a</sup>

#### II.

**1961. Two Sorts of Questions in the Matter of Damages.**—*The First, whether any are due.*—All the rules concerning the matter of damages respect either the question whether any be due, or in what they do consist. The question whether any damages be due is always a question of law, which depends on knowing if the person to whom they are imputed ought to be answerable for them. Thus, for example, the question which arises upon the case explained in the seventh article of the fourth section of the title of

\* *L. 19, D. de usur.*; —*l. 13, § 1, D. de ann. legat.* Although this last text concerns another subject, yet it may be applied to this.

As to the engagements in which interest is due, see the articles which follow:—*Art. 4, sect. 3, of Covenants*; *art. 5, sect. 3, of the Contract of Sale*; *art. 3, sect. 3, of the Loan of Money*; *art. 5 and 11, sect. 4, of Partnership*; *art. 4, sect. 2, of Proxies*; *art. 23, 24, 25, sect. 3, of Tutors*; *art. 5, sect. 5, of the same title*; *art. 5, sect. 3, of Curators*; *art. 8, sect. 1, Of those who manage the Affairs of others, &c.*; *art. 5, sect. 2, of the same title*; *art. 4, sect. 2, Of those who chance to have any Thing, &c.*; *art. 1, sect. 3, Of those who receive what is not due to them*; *art. 1, sect. 2, Of that which is done to defraud Creditors*; *art. 2, sect. 3, of Cautions, or Sureties.*

<sup>a</sup> *L. 5, § 1, D. de prescript. verb.*; —*l. 29, § 2, D. de edil. edict.*; —*l. 68, D. de rei vindic.*

*Damages occasioned by Faults*, in relation to the person who cuts the ropes of a ship, in order to disengage his own vessel, which a blast of wind had thrown upon the other, is a question of law; in which it is necessary to judge whether this damage ought to be imputed to him, or whether those who suffered it ought to bear it as an accident.<sup>b</sup>

### III.

1962. *The Second Question is in what they do consist. — Example of this Question.* — This first question, whether any damages be due, being decided, then follows the second question, which is to know in what they do consist; that is, to discern, in the whole extent of the damage which has happened, what part thereof ought to be imputed to him who is obliged to indemnify, and what ought not to be imputed to him. For it often happens as has been mentioned in the preamble to this title, that one bare act gives occasion to several damages, part whereof is not imputed to him who is said to have been the cause of them. Thus, for example, if he who has sold corn, and promised to the buyer to deliver it on a certain day, in a certain place, does not keep his word, and the said buyer is either obliged to buy other corn at a dearer rate, or finding none other to buy, he loses the sale thereof in another place, where he might have hoped to have made profit by it; or for want of the said corn, which he designed for the subsistence of a great many workmen, he by that disappointment suffers the loss of their labor, and the interruption of a work that is useful or necessary to him; these events will give rise to the question, whether this seller shall be answerable either for all these consequences, or a part of them; and what shall be the damage that he will be obliged to make good. And this question, which is to fix and ascertain what is the precise damage that is to be repaired, is a second question of law, of which we shall see another example in the following article.<sup>c</sup>

<sup>b</sup> All questions are either concerning matter of fact or law, *de facto an de jure*. *L. ult. D. de jurej.* We call those questions of fact, where the matter is to know the truth of a fact: if an event has happened or not; if the person whose inheritance is controverted has made a testament, or if he has made none; if he who complains of damage has really sustained some loss, or if he has sustained none. We call those questions of law, where in the matter is to know how we ought to judge, and where it is necessary to reason upon principles and rules, in order to form the decision.\* As to the difference between questions of law and those of fact, see the first section of the *Vices of Covinants*.

<sup>c</sup> *L. 21, § 2, D. de act. empt. et vend.* We have not put down in this article the exam

## IV.

1963. *Another Example of the same Question.* — If the proprietor of a vineyard, or other person who had right to the fruits thereof, having hired carriages for gathering the grapes thereof on a certain day, he who undertook to furnish them fails in his promise, and the owner of the vineyard is obliged to hire other carriages at a dearer price; or that, finding none to hire, he is forced to defer his vintage, and it happens that a shower of hail comes and destroys all the grapes, with the produce of which the owner had proposed to pay off a creditor, who, being disappointed of his payment, seizes on the owner's goods, and exposes them to sale; the person who undertook to furnish the carriages will without doubt be obliged, in the first case, to make good the overplus that the owner of the vineyard was forced to give for other carriages. But in the second case, of the loss of the vintage, and of the seizure of the owner's goods by a creditor, this will be a question of law, to know what this event will oblige the carrier to. And one clearly sees that the seizure and sale of the goods is a consequence too remote from the act of this carrier, and that it proceeds likewise from another cause, to wit, the disorder in which the affairs of the owner of the vineyard were; for which reason this last loss ought not to be imputed to him.<sup>d</sup> For his condition ought not to be worse, for having failed in his promise to a person who was under such straits and difficulties, than it would have been if he had disappointed a person whose affairs were in a better state. But as to the loss of the fruits, is the carrier bound to make good the whole, or a part thereof, or nothing at all? Will it be said, that this is an event altogether unforeseen, which ought not to be imputed to him?<sup>e</sup> or that it was natural to foresee it, and that his non-performance of his engagement deserves some punishment, — if not a condemnation to make good the whole loss of the vintage, yet at least a part of it? This question ought to depend on the circumstances, and it is necessary to consider if the disappointment of the carriages was occasioned by some accident, that happened to the carrier, or if he had preferred a greater gain in another place; or if some other cause had hindered him from

ple mentioned in the law that is here cited, because it is in the eighteenth article of the second section of the *Contract of Sale*.

<sup>d</sup> This is a consequence of the foregoing article, and of the remarks which have been made in the preamble to this title.

L 64, D. de reg. jur.

performing his engagement, if it was possible to hire other carriages: and according to these circumstances, and others of the like nature, the judge will determine whether he ought to make some reparation of this damage, or none at all; and it would be just to acquit him of all damages, if he had been hindered from performing his engagement by an accident which had happened without any fault of his.

## V.

1964. *The Third Question about the Estimate of Damages.*—When the questions of law have been decided, and it is determined that damages are due, and wherein they do consist, there remains a third question, to know what they are to be estimated at, which is to be looked upon only as a question of fact.<sup>1</sup> Thus, for example, if he who had sold corn which he promised to deliver on a certain day, in a certain place, having failed in his promise, it be adjudged by the circumstances that no other damages are due, except on account that the said buyer was obliged to buy other corn in the same place at a dearer rate; there is nothing necessary for estimating this damage, but to inquire how much dearer he has bought the other corn.<sup>2</sup> Which is only a matter of fact.

## VI.

1965. *Two Sorts of Damages which ought to be distinguished.*—It appears from the rules explained in the third and fourth articles, that the damages and losses of which reparation may be demanded are of two sorts. One is of the losses which are in such a manner a consequence of the act of the person from whom reparation is demanded, that it is evident they ought to be imputed to him, as proceeding from no other cause. And the other sort, of those losses which are only remote consequences of the said act, and which proceed from other causes.<sup>3</sup> Thus, in the case of the preceding article, the loss is of this first kind.<sup>1</sup> Thus, for another example of the same kind, if an architect, either out of ignorance or through a defect in the materials which he was obliged to fur-

<sup>1</sup> L. 24, D. de reg. jur.

<sup>2</sup> L. ult. D. de cond. trit.; — l. 59, D. de verb. oblig.

<sup>3</sup> See the preamble to this title.

<sup>1</sup> L. 21, § 3, D. de act. empt. et vend.; — l. 31, D. de reb. cred. See the seventeenth article of the second section of the Contract of Sale.

ish, makes a building faulty, the damages of the owner of the building consisting either in the charges of rebuilding what is necessary to be rebuilt, or in the estimate which skilful persons shall make of the defects of the work, if it is to remain in the condition it is in; these damages are such as have no other cause besides the fault of the architect, and therefore they ought to be imputed to him.<sup>1</sup> Thus, for the second sort of losses, we see in the case of the fourth article, that the seizure of the goods of the person whose vintage was destroyed by a shower of hail is, it is true, a consequence of the disappointment of the carriages which he had agreed for, but a consequence so remote from that fact, and so visibly owing to another cause, that it ought not to be imputed to the person who was to have furnished the carriages.<sup>m</sup>

## VII.

1966. *Damages either for a Loss sustained, or for having failed to make a Profit.*— It is necessary, likewise, to distinguish damages under another view, into two other kinds. One is of those which consist in an effective loss, and a diminution that one suffers of his present estate. And the other kind is of those which deprive one of some profit to be made. Thus, the landlord of a house which is damaged, by the neglect of the tenant to make the repairs which he was obliged to make, suffers a loss and diminution of his present substance. Thus, a farmer whose lease is interrupted is deprived of the profit which he might have made, had he been permitted to enjoy the farm. In the damages of the first kind, the estimate that is to be made thereof being in relation to a loss that has actually happened, it is easy to see wherein the said loss consists, and to regulate the reparation that may be due for it, when it is the whole loss that is to be made good. But in the damages of the second kind, where an estimate is to be made of the loss of a profit to come, and which depends on uncertain events, which might render it greater or lesser, and which might also occasion that there would be no profit at all, or that there would be only loss, it is not possible to make an exact estimate of such a loss, and to regulate such a reparation of damages as may do exact justice both to the farmer and to the person who is bound to make good his damage. But as for these sorts of reparations

<sup>1</sup> L. 51, § 1, D. locat.

<sup>m</sup> See the eighteenth article of the second section of the *Contract of Sale*, and the preamble to this title.

of damages, it is necessary to adjust them according to the principles which have been explained in this title, and from whence we have drawn what shall be said relating thereto in the twelfth article.

## VIII.

1967. *Difference in Damages, according as the Person who owes them has acted fairly or unfairly.* — In all the cases where damages are due, it is necessary to consider the quality of the act which has occasioned them, and to distinguish between the acts in which there is no fraud or knavish dealing, and those in which there is. For according to this difference, the damages may be either greater or lesser, although all the other circumstances should chance to be equal. Thus, for example, if the purchaser of a house or lands is turned out of possession by an eviction, after he has not only made necessary repairs and improvements, which have augmented the revenue, but has also been at some charges for embellishments, these useless and superfluous expenses will not be comprehended in the damages for the eviction, if the seller has acted honestly and fairly, having had reason to look upon himself as the true owner of the house or lands which he had sold. For the warranty ought not to be extended to such consequences, for expenses which the seller could not well foresee, and which the purchaser had laid out only for his pleasure. But if the seller knew well enough that he was not the right owner of the house or lands which he sold, and so sold knavishly a thing belonging to another person, this circumstance of his knavish dealing would give a larger extent to the warranty, and he would be bound to refund the superfluous expenses, which the purchaser would not have laid out if he had known any thing of the seller's unfair dealing with him. Thus, for another example, if a thing that was sold happens to have some defect in it, which occasions some

\* L. 24, § 4, *D. locati*; — l. 33, in *fin. cod.* See the sixth article of the sixth section, and the fourth article of the third section of *Letting and Hiring*. It is to be remarked on this article, that, in the reparation of damages to be made to this farmer, we ought to distinguish between that which relates to the estimate of the profit which he might have hoped to make if his lease had not been interrupted, and another sort of damage which he might suffer at the present; as if his having taken the farm had obliged him to buy cattle, or other things necessary, or to settle there, or put him to other charges of the like nature, the loss of which would be a damage of the first kind, which might be estimated at its just value, and separately from the loss which the farmer sustains by not enjoying the farm.

damage; as if it was cattle infected with some contagious distemper, which caused not only the death of the cattle that were bought, but also of those which the buyer had before; the seller who knew nothing of this distemper would be answerable only for the loss of the cattle which he had sold, his engagement not extending to this consequence of the loss of the other cattle. But if the seller knew of the distemper, he would be likewise liable to make good the loss of the other cattle which the buyer had before, because he ought to have warned him of the infection that was among the cattle which he sold him, and it is his knavery that has given occasion to this other loss which the buyer sustains by the death of his other cattle. Thus, in general, damages have a larger extent against those whose knavery makes them answerable for them, than against those who have acted honestly and fairly. For although a seller, for example, who knavishly sells what he knows to be another's, may be ignorant, as well as one who believes what he sells to be his own, whether the purchaser will lay out any superfluous expenses on the thing that is sold, yet he cannot but know that his knavery implies a will to do all the evil which may ensue upon the said sale. Thus, whereas the eviction is, in regard to a seller who has dealt fairly and honestly, an accident which he could not foresee; the said eviction, and the losses which follow upon it, are, with respect to a seller who has acted unfairly and knavishly, a natural consequence of his knavery, for which he ought to be accountable.\*

\* *L. 49, in f. D. de act. empt. et vend.*; — *L. 45, § 1, in f. eod.* See the eighteenth article of the tenth section of the *Contract of Sale*. *L. 13, D. eod.*; — *v. d. l. § 1*. One may be able to judge by the examples mentioned in this article of the use of this rule, for distinguishing in all sorts of cases between the damages which are due from those who have given occasion to them by any fraud or knavery, and those which may be due even when there is no unfair dealing. See an example of another nature in the nineteenth law, § 1, *D. locat.*, where it is said that if, a pasture-ground being farmed out, the cattle who depasture therein die by eating of venomous herbs, the owner of the ground knowing nothing of this bad quality which it had will not be accountable for the loss of the cattle, but he will be bound only to discharge the farmer of his rent; but if the owner of the ground knew of this bad quality, he will be obliged to make good the loss of the cattle which perished by feeding therein. *L. 19, § 1, D. locat.*

See the sixth and seventh articles of the eleventh section of the *Contract of Sale*, the eighth article of the third section, and the first and second articles of the eighth section of *Letting and Hiring*.

It is observable that in the Roman law they made this difference, as to damages which might be due from those who did not restore a thing which they were bound to restore or deliver up, that, if there was no knavery in the case, the condemnation in damages went no higher than the value of the effective damage which the person suffered who had in-

## IX.

1969. *Of the Regard which ought to be had to the Quality of the Act which has caused the Damage.*—When there is neither any design to hurt, nor any knavery in the act which has caused the damage, it is necessary to inquire, in the next place, if the damage has happened through any negligence, or any fault, or if there is nothing that can be imputed to the person who is pretended to be answerable for it. Thus, for example, if he who has hired a horse rides him in a dark night, in a stony way, full of bad steps, and the horse lames himself, or if, for want of care, he is stolen, these sorts of faults may be imputed to the person who hired him. But if without his fault the horse is lamed, or if he is carried off by robbers, at noonday, in a highway, the owner of the horse will bear the loss. For these losses are accidents which fall upon the owner.<sup>p</sup>

## X.

1969. *Damages may be due, even although they have not been occasioned by any Fault.*—Although there be no fault on the part of the person from whom a reparation of damages is demanded, yet this is not always enough to discharge him of it. For there are cases in which damages are due, although they have not been occasioned by any fault; but are due by the bare effect of an engagement. Thus, he who had sold honestly a thing which he believed to be his own is obliged to put a stop to the demand of the person who pretends to be owner of it; and if he does not do it, he will be liable to the damages of the eviction, although there be on his part no unfair dealing, nor any other kind of fault. Thus, he who fails to deliver what he has sold is accountable for the damages which are occasioned by his failing to deliver it. And these damages are bare consequences of the engagements which the seller is under.<sup>a</sup>

terest therein. But if the party was guilty of any fraud or contumacy, that is, if it was a wilful delay, the party who was injured thereby was allowed to give in upon oath an estimate of the loss or damage which he sustained; and it was left to the discretion of the judge to limit the oath to a certain sum, and even to mitigate the condemnation after oath had been made. *L. 2, § 1, D. de in lit. jur.*; — *l. 5, § 1, eod.*; — *d. 7, § 2; — v. tit. C. de in lit. jur.*

<sup>p</sup> *L. 38, C. de locato.*

<sup>a</sup> *L. 70, D. de evict.*; — *l. 60, eod.* See the tenth section of the *Contract of Sale*. *L. 1, D. de act. empt. et vend.*; — *l. 31, D. de rebus cred.* See the sixteenth and seventeenth articles of the second section of the *Contract of Sale*, and the fourth article of the third section of *Covenants*.



## XI.

1970. *Consequences which appear remote, and yet enter into the Estimate of Damages.* — It hath been remarked in the sixth article, that we ought not to impute to the person whose act hath caused some damage the consequences that are remote, and which may proceed from other causes which some conjuncture hath joined with the said act; and that these sorts of consequences do not enter into the estimate of damages. But we must not reckon in the number of those remote consequences the different losses which may be occasioned by the same act, if the said losses have that act for their only cause. Thus, for instance, if an architect, having undertaken to build a house, and to perfect it by such a time, for a tenant who had hired it, does not finish it by the time appointed, or makes it so faulty that a part of it falls to the ground, either by a defect in the foundation, or by some other cause for which the architect is answerable; this event will cause three sorts of losses, that of the expense of rebuilding the house, the loss of the rent which the landlord ought to have had, and that of the damages which the landlord will be liable for to the tenant, for disappointing him of his house. And although this second and third loss be consequences that appear remote from the act of the undertaker, yet seeing they have no other cause, and that his contract implied the obligation to put the house in a condition to be inhabited, these losses may be imputed to him. And if this case had happened by the fault of an architect who was able to make good all these losses, he would be bound to do it. But because undertakers have not always the means to make such ample reparations of damages, and humanity obliges us on some occasions to moderate the rigor which a strict justice might demand, a temperament may be applied in estimating these sorts of damages, by considering that these are events which happen to the most skilful and most careful persons. Thus, it depends always on the prudence of the judge, and of the persons employed to make those estimates, to regulate them according to the circumstances.\*

## XII.

1971. *Damages for Losses which depend on Future Events.* — The same equity which makes us often moderate the damages for

\* Multa oriri possunt quæ pro bono sunt æstimanda. Ideoque hujusmodi varietas viri boni arbitrio dirimenda est. L. 13, § 1, D. de ann. leg. Although this law relates to another subject, yet the principles on which it depends may be applied here. L. 38, D. de evict.

present losses, by the motives explained in the preceding article, does much more oblige us to mitigate them in cases where the losses are not present, and where the estimate thereof, depending on future events which cannot be known, cannot be regulated on any certain foot. Thus, in the case of the farmer mentioned in the seventh article, it is necessary to adjust his damages by several views; and to consider what is the cause which turns him out of possession, as if the person who let him the farm is turned out of possession by a recovery at law, or if he has sold it without obliging the purchaser to stand to the lease; what have been the profits or losses which this farmer hath already had; the number of years which his lease had still to run; the quality of the fruits of his farm, according as they were more or less obnoxious to the injuries of the weather, and to other losses; the uncertainty of the value of provisions; that of the opportunities which the farmer might have had, or not have had, during the time of his lease, to sell the said fruits; the usual profits made by other farmers of the like revenues in the same places: and by all these views, and others of the like nature, we may balance both the profits which this farmer might hope to make, and the losses which he had to fear; and may regulate by these considerations such a reparation of damages as may be agreeable to equity.\*

## XIII.

1972. *The Prudence of the Judge in estimating Damages.*—It follows from all the preceding rules, that, as the questions relating to damages arise always from acts which vary according to the circumstances, it is by the prudence of the judge that they are to be decided, he joining to the light which the principles of law and equity may give him a prudent discernment of the circumstances, and of the regard that ought to be had to them: whether it be for lessening the damages that are to be adjudged, by cutting off pretensions for distant losses, and upon other considerations, if there be ground for it, as in the cases where no bad design nor any fault can be imputed to the person who is bound to make good the damage: or for increasing the damages which are to be given in consideration of the intention to hurt, if there was any. Thus, for an example of the lessening of the damages, in the case where a seller, who has sold a thing which he verily believed to be his

\* *Id.* 24, § 4, D. locat. See the seventh article.

own, is bound to warrant the thing sold against an eviction, the reparation of damages will not be extended to the superfluous expenses which the purchaser may have laid out barely for his own pleasure : and much less will there be any regard had to the particular considerations which might render the said purchase more precious in the eye of the purchaser, whether it were because it had been an ancient patrimonial estate belonging to his family, or that he took delight therein because he had been brought up in it. For the price of things is not regulated by affection, which may make them more valuable to some than to others ; but only on the foot of what they may be worth to all persons indifferently.\* Thus, on the contrary, in the case where one had, by some trespass, occasioned the loss of a thing which was of necessary use for the matching of others, which, for the want of that which perished, became useless, as it may happen on several occasions ; the person who had caused this damage would be accountable, not only for the value of the thing lost, but also for the damage which the said loss had occasioned besides, by the want of the use of the other things.<sup>u</sup> For this damage, which might have been considered as an accident if the loss of the thing had happened only through some imprudence, might be imputed to him who had caused it with an intention to do harm.

#### XIV.

1973. *Damages against Litigious Persons.* — Among all the causes from whence damages may arise, there is none more frequent than the injustice of those persons who, by prosecuting or defending unjust lawsuits, cause to their adverse parties, not only charges which are almost never made up by the costs of suit which they are condemned in, but likewise other damages, of which those lawsuits are the only cause ; such as the loss of time, especially in those who live by their labor, and many other consequences of the injustice and cavilling humor of litigious persons. Which makes it very just and reasonable that such persons should be condemned in damages whenever the vexation is such as may deserve it. And although this rule be so rarely observed, that it looks as if it were quite abolished, yet, seeing it is founded upon

\* L. 63, D. ad leg. Falcid. ; — C. 33, D. ad leg. Aquil. ; — l. 1, § 15, D. si quid in fraud. patr. factum sit. What is said in this law touching the fraud committed against the rights of a patron may be applied to the case of an eviction.

<sup>u</sup> L. 21, § 2, D. ad leg. Aquil. ; — l. 22, § 1, eod.

equity, that it is agreeable to the law of nature, and that it has been revived by the ordinances, it would be proper for the judges to put it in execution whenever the injustice, the cavilling, and vexatious humor of the parties may deserve it.<sup>2</sup>

**XV.**

**1974. Stipulation of a certain Sum in Lieu of all Damages.**—The difficulties in settling the value of the damages which may ensue upon the non-performance of an engagement, oblige sometimes those who contract together to agree on a certain sum, which he who fails to perform what he has promised on his part shall be bound to pay to the other, to be to him instead of a reparation of damages. But, seeing these sorts of stipulations are not so much a just estimate of the damage as a precaution for engaging the contractor to a more exact fidelity, through fear of incurring the penalty of paying the sum agreed on, it depends on the prudence of the judge to moderate the said sum, if it exceeds the real damage. For he who has suffered the damage cannot reasonably pretend to more than what may be lawfully due to him. And this stipulation hath its just effect by a reasonable satisfaction for the loss that is to be repaired. But if the agreement is conceived in such terms as show that it was the intention of the parties to limit the reparation of damages to a certain sum in favor of the person who might be liable thereto, and to prevent his being obliged to any thing beyond that sum, although the damage should chance to be greater; in this case the damage could not be estimated at more than the sum agreed on. For the persons who have contracted in this manner had power to mitigate the reparation of damages that might be due.

<sup>2</sup> *Improbis litigator et damnum, et impensas litis inferre adversario suo cogatur. § I, in f. Inst. de pems tem. litig. ; — v. tit. C. de jurcj. prop. cal. dand.*

In all matters real, personal, and possessory, civil and criminal, there shall be judgment for damages arising from the suit, and from the calumny and temerity of the person who loses the cause, which shall be taxed and moderated by the same sentence or judgment at a certain sum, provided always that the said damages have been demanded by the party who has gained the cause, and of which the parties may give in a summary account in the proceedings of the cause. Ordinance of Francis I., in August, 1539, art. 88.

Those persons who do not understand Latin must be here informed that the word *calumny*, in the above-mentioned ordinance, as well as in the Roman law, signifies the vexation and cavilling of those who knowingly and wilfully prosecute or defend unjust law-suits.

† *L. ult. D. de stip. protog. ; — § ult. Inst. de verb. oblig.* See the eighteenth article of the fourth section of Covenants.

## XVI.

1975. *All Damages are estimated in Money.* — All damages, of what nature soever they may be, are reduced to sums of money which those persons owe who are obliged to make any reparation, whether it be for having failed to perform their engagements, or for other causes. For money is in place of all things that are capable of being estimated.\*

## XVII.

1976. *Losses which he who is the Cause of them is not obliged to make good.* — We must not reckon indifferently in the number of the cases where damages may be due, all the events where one person may cause by his deed some loss to another. For it often happens that one is the cause of loss, without being bound to make it good. And when the acts which have been the occasion of the loss have been lawful, and the loss has been only a privation of some convenience, and a consequence of the act of a person who did nothing but use his own right, he will not be bound to repair it. Thus, for example, he who, digging in his own grounds, finds there a spring, which he turns to his own use, will not be bound to make good the loss which his neighbour will suffer by being deprived of the said spring, which will by this means cease to rise any more in his ground, unless the said change had been made with no other view but to do harm. Thus, he who, not being subject to a service, raises his building higher, and by that means takes away the light or prospect from his neighbour's house, cannot be hindered from doing it. But if the change made by a person in his own ground destroys or damages a thing belonging to his neighbour, as if one, digging in his own ground, weakens thereby the foundations of his neighbour's wall, and puts it in danger of falling, he will be answerable for it: for the acts which hurt in this manner cease to be lawful; and one cannot dig in his own ground near the confines of his neighbour, or make other works, unless he observes the distances and uses the other precautions prescribed by the usage and custom of the places.\*

\* L. 13, in f. *D. de re judic.*

\* L. 26, *D. de damn. inf.*; — C. 1, § 12, *D. de aqua et ag. pluv. arc.*; — L. 24, § 12, *D. de damn. inf.* See the eighth and ninth articles of the second section of *Services*, and the ninth and tenth articles of the third section of *Damages occasioned by Faults*.

## XVIII.

1977. *A General Remark on the Questions relating to Damages.*

— As we have remarked, in the matter touching the interest of money, the several views by which we may judge if any interest be due, or not;<sup>b</sup> so we ought also to discern, in questions that arise about damages, whether any be due or not. And this depends on the quality of the act which may have given occasion to the damage; if it is an accident, a slight fault, an imprudence, a crime, an involuntary non-performance of an engagement, or some other cause. And then inquiry is made, in the next place, what the damages may consist in; giving them either the extent or bounds which equity may demand, according to the different causes of the damages, the diversity of the events, and the circumstances, observing therein the rules which have been explained.<sup>c</sup>

## SECTION III.

## OF THE RESTITUTION OF FRUITS.

## ART. I.

1978. *The Restitution of Fruits is a Reparation of Damages.* — The restitution of fruits is a kind of reparation of damages, which is due from him who hath unjustly enjoyed the revenue of another. For this restitution repairs the loss of the person who ought to have enjoyed the revenue.<sup>a</sup>

## II.

1979. *The Extent of this Restitution.* — This term, restitution of fruits, comprehends not only the obligation to restore those which are in being; but although the enjoyment has been for several years, and the fruits of those years be consumed, yet, seeing it is the value of the said fruits which ought to be restored, and that their value is instead of the fruits themselves, the restitution of the

<sup>b</sup> See the fifteenth article of the first section.

<sup>c</sup> This is a consequence of the preceding articles. *L. un. C. de sent. quæ pro eo quod int. prof.*

<sup>a</sup> As interest is the reparation of damages which is due from debtors who owe sums of money, and are behindhand in payment, so the restitution of fruits is a reparation of damages due from those who have unjustly enjoyed the revenues belonging to other persons.

fruits is to be understood both of such fruits as are still extant, and also of those which are consumed.<sup>b</sup>

### III.

1980. *The Word "Fruits" is understood of all Sorts of Revenues.* — We must not in this place limit the word *fruits* to the ordinary sense of the fruits which the earth produces; but this word signifies here all the different sorts of revenues, of what nature soever they may be. And they may be distinguished into two kinds; one is of those which the earth produces, whether it be of itself and without being cultivated, such as hay, the fruits of trees, coppice-wood, the minerals dug out of mines, the stones of quarries, and others of the like nature; or by culture, such as corn and other grain.<sup>c</sup> The other kind is of revenues which are not the fruits of the earth, nor things which it produces, either of itself or by culture, but which are reaped by industry and care, either from some tenement or animals, or from some right established by law. Thus, one gathers rent from a house or other building.<sup>d</sup> Thus, one draws from a ferry-boat or a ship a revenue for the carriage of persons and goods.<sup>e</sup> Thus, mills and pigeon-houses have their revenues; and the several sorts of animals, which are for our use, have also their revenues.<sup>f</sup> Thus, one has rights of fishing and hunting, tolls, and divers other rights of several natures. And all these different revenues of these two kinds, which come in yearly or daily, are so many sorts of goods, the enjoyment whereof may be the subject-matter of the restitution spoken of here.

### IV.

1981. *The Unjust Possessor is bound to restore all the Fruits which he has enjoyed.* — All those who enjoy a revenue which they know they have no right to are bound to restore to the person whom they have deprived of it the value of all that they have reaped from it, although they have not been disturbed in their enjoyment by any demand. For they were sensible of the injustice which they were doing to the person who had a right to enjoy.<sup>g</sup>

<sup>b</sup> This is a consequence of the foregoing article.

<sup>c</sup> L. 9, D. de usufr.; — l. 59, § 1, eod.

<sup>d</sup> L. 36, D. de usufr.

<sup>e</sup> L. 29, in f. D. de hered. pet.; — l. 62, D. de rei vind.

<sup>f</sup> L. 28, D. de usur.

<sup>g</sup> L. 22, C. de rei vind.; — l. 17, eod.; — l. 3, C. de condict. ex leg.

## V.

1983. *The Possessor who verily believed himself to be the right Owner does not restore the Fruits which he has enjoyed during this Belief.* — Those who are honestly in possession of an estate, which they believe to be their own when it is not, are not bound to any restitution of what they have enjoyed during the time that they were fully persuaded of their right and title to the said estate. For the integrity of a possessor hath this effect, that he may look upon himself as master of the thing which he possesses; and this upright persuasion of his, which he has reason to take for truth, ought to put him in the same condition as if he were really master.<sup>b</sup> Thus, the loss which the right owner sustains by not enjoying is, in regard to him, an accident which he cannot impute to this possessor.

## VI.

1983. *The Upright Possessor restores the Fruits after a Legal Demand.* — The integrity of the possessor, which gives him the right to enjoy the estate, ceases at the same time that his possession is called in question by a demand made by the right owner. For, having once known the right of the true owner of the estate, he cannot any longer deprive him of the enjoyment thereof. And although he may pretend that the demand is ill-founded, and may think that his defences against it are just, yet, if afterwards he is condemned to restore the estate, his upright possession of his own right and title when he defended himself will be of no avail to him; and he will be obliged to make restitution of the fruits from the time of the demand.<sup>1</sup> For this belief of his own right, let it be never so upright and sincere, cannot have the effect of hurting the true owner, who has known his right and demanded his estate, or, of counterbalancing the authority of a thing that is adjudged.

<sup>b</sup> L. 25, § 1, *D. de usur.*; — l. 48, *D. de acq. rer. dom.*; — l. 136, *D. de reg. jur.* See the fifth article of the third section of *Possession*. See, concerning the cases where the upright possessor restores the fruits which have been reaped before the demand, the ninth and tenth articles of this section.

We call him an upright possessor who has just cause to believe himself to be master of the thing, as if he has purchased an estate which he thought did belong to the person of whom he bought it, if it has descended to him by inheritance, if it has been given him, or if he has acquired it by some other just title, being ignorant of the right of the true owner.

<sup>1</sup> L. 2, *C. de fructib. et lit. exp.*; — l. 20, *D. de rei vind.* See the thirteenth article.



## VII.

1984. *The Fruits that are cut down belong to the Upright Possessor, although they be still lying on the Ground.* — If a possessor, who is verily persuaded of his own right, is summoned just before harvest-time, by the master of the ground, to deliver up the possession and to restore the fruits, and in the event of the lawsuit he is condemned, he will be obliged to restore the fruits of that crop. For seeing they were not cut down at the time of the demand, they made a part of the ground, and the demand interrupted the right which the possessor had to enjoy them. But if the fruits were separated from the ground before the demand, although they were not yet carried away, but lay still in the field, they will belong to this possessor.<sup>1</sup> For he having gathered and separated them from the ground, they belonged to him, and one cannot afterwards take away his property in them, nor hinder him to carry off what is his own.

## VIII.

1985. *Of Revenues which come in successively.* — If the revenues of a tenement, which is possessed by one who sincerely believes himself to be the true owner thereof, come in successively, and day after day, as the rents of a house, the revenue of a mill, of a ferry-boat, of a toll, and others of the like nature, and the said tenement be recovered by law from the possessor, he shall have whatever fell due before the demand, and must restore the rest.<sup>m</sup>

## IX.

1986. *A Case where the Possessor who believes himself to be the true Owner restores the Fruits.* — There are cases where the possessor who takes himself to be the right owner is obliged to make restitution of the fruits which he has enjoyed. Thus, for instance, if two brothers being coheirs to their father, one of them being absent, the other has enjoyed all the goods and effects of the inheritance, believing that his brother was already dead, he will be obliged to restore to him when he returns all his share of the inheritance, with the fruits which it has yielded. And it is the same thing with respect to all other coheirs, whether they succeed by testament or without testament, when one of them has enjoyed

<sup>1</sup> L. 13, D. quib. mod. usufruct. vel us. amit.; — l. 48, D. de acq. rer. dom.; — l. 78, in fin. D. de rei vind.

<sup>m</sup> See the sixth article of the first section of *Usufruct*.

the portion belonging to the other.<sup>a</sup> For the title of heir only gives him right to his own portion; and the portion of his coheir is increased by the fruits which proceed from it. Thus, the integrity of the heir who enjoys all the goods of the succession implies the condition, that, in case it shall be found that he has a coheir, he will do him justice as to his portion. And this distinguishes the condition of this heir from that of another possessor who takes himself to be the true owner, and who has no reason to think that any body besides himself has a right in what he possesses.

## X.

1987. *Another Case of the like Nature.* — If one copartner has enjoyed alone a house or lands belonging in common to the whole partnership, although he thought that he had the sole right to it, and although his enjoyment thereof was honest, and with an upright intention, yet he will nevertheless be obliged to make restitution of the fruits for the shares of his copartners.<sup>o</sup> Thus, for example, if, in the case of a universal partnership of all goods without distinction, one of the partners, to whom a relation or friend had devised by will, or given by deed of gift, an estate, had enjoyed the same apart by himself, believing, through an error in law, that his copartners had no share therein, he will be bound, notwithstanding his upright intention, to restore to them their portions of the fruits of that estate,<sup>p</sup> because their partnership making the said estate common to them all, the right of that partner was restrained to his own portion; and his upright intention, which had for its foundation only an error in law, did not give him a title to enjoy the portions of the other partners.<sup>q</sup>

<sup>a</sup> L. 9, C. *famil. ercis.*; — l. 17, C. *coll.*; — l. 44, D. *coll.*; — l. 20, § 3, in f. D. *de hered. petit.*; — l. 2, C. *de petit. hered.* If the person who succeeded alone to an inheritance which was not then claimed by any other heirs, having enjoyed it for several years, there started up another heir, in the same degree with him, but whose relation was till then unknown; and if the heir who had enjoyed the whole inheritance during this long time was not able to restore the fruits of the portion belonging to his coheir without being ruined, or very much incommoded thereby, it would be equitable to moderate the said restitution by some temperament according to the circumstances.

<sup>o</sup> L. 32, § 2, D. *de usur.*; — l. 38, § 1, D. *pro socio.*

<sup>p</sup> See the fourth article of the third section, and the first article of the fourth section of *Partnership*. See, in the fourteenth article of this section, another case where a possessor who believes himself to be the right owner restores the fruits. See the third article of the third section *Of those who receive what is not their Due*, and the remark on the said article.

<sup>q</sup> See the sixteenth article of the first section of the *Vices of Covenants*.

## XI.

1988. *We must deduct from the Value of the Fruits to be restored the Expenses laid out upon them.* — The restitution of the fruits does not extend to their full value, but we must deduct from the value the expenses that were necessary for the enjoyment thereof: such are the expenses for tilling the ground, for the seed, and those which are necessary for gathering in the fruits, and preserving them. And this deduction is allowed even to possessors who knew what they enjoyed not to be their own; for these expenses being necessary, they diminish the effective value of the revenues, which consist only in what remains after all charges are deducted.

## XII.

1989. *The Fruits belong to the Master of the Ground, and not to him who tills and sows it.* — Although, in many sorts of revenues, the industry of the person who has enjoyed them may have had the greatest share therein, yet they belong to him who is master of the ground which has produced them; and the restitution of such fruits is not the less due to him, because the industry of another person has been instrumental in producing them. For the culture, the seed, and all the industry that is necessary for reaping fruits, and other revenues, do presuppose the ground which is to produce them. Thus, it is to the right of property which one has to the ground that the right of enjoyment is annexed; and the revenue which may be drawn from the ground belongs to him who is master of it, deducting from the value of the revenue the expenses necessary for enjoying it.\*

## XIII. .

1990. *The Unjust Possessor is bound to make Restitution of the Fruits which might have been gathered from the Ground.* — The possessor who knows what he possesses not to be his own is not

\* L. 1, *C. de fruct. et lit. exp.*; — l. 7, *D. solut. matr.*; — l. 36, § ult. *D. de hered. pet.* This deduction of the expenses that are necessary for enjoying the fruits is grounded on the same equity as the restitution that is due to a possessor of all useful and necessary expenses which have been laid out for improving the thing which he had in his possession, or for preserving it; and which is allowed even to unjust possessors, when they are turned out of their possession. L. 38, *D. de hered. pet.*

See the sixteenth article of the tenth section of the *Contract of Sale*, and the fourth section *Of those who receive what is not their Due.*

\* L. 25, *D. de usur.*; — d. l. 25, § 1.

only bound to make restitution of the fruits which he has reaped, but if, by his absence, or through negligence, and for the want of cultivating, he has not reaped any fruits from the ground which he was in possession of, or if he has reaped only a part of what the ground might have yielded if it had been cultivated, he will be accountable for the fruits which a good husband might have reaped.<sup>4</sup> For the master of the ground might have enjoyed it in this manner. But with regard to a fair possessor, who takes himself to be the right owner, and who is notwithstanding obliged to restore the fruits, the restitution may be regulated differently, according to the circumstances. Thus, a fair possessor, who believed himself to be the right owner, having been sued by the master of the thing which he is in possession of, may afterwards be compared to an unjust possessor, and condemned to the same restitution with him, if, after the demand made by the right owner, he has neglected the enjoyment thereof, or if he has diminished the revenue by not making the necessary repairs; and he will be answerable for it, as having done it in fraud of the restitution which he had reason to be afraid of. But he who is obliged to make restitution of fruits which he had honestly and fairly reaped before any demand was made, as in the cases mentioned in the ninth and tenth articles, might be excused, if, for want of repairs, or by reason of any other neglect, he had not drawn from a ground, which he thought he might neglect with impunity, believing it to be his own, that profit which another person might have made of it with greater care.<sup>5</sup>

## XIV.

1991. *The Heir or Executor of an Unjust Possessor succeeds to his Engagement.* — The heirs or executors of unjust possessors are bound to the same restitution as they are to whom they succeed, for they come in their place. And as they have the goods and rights belonging to the said persons, so they bear likewise their burdens, and enter into the same engagements which they were under; and although they may happen to be altogether

<sup>4</sup> L. 33, *D. de rei vindic.* See the sixth article of the third section of *Possession*. See the texts cited on the sixth article.

<sup>5</sup> Although the text cited on this article makes no distinction between possessors who believe themselves to be the right owners of what they possess, and those who know that they possess what is another's, yet it seems to be just to distinguish them in the manner they are distinguished in this article.

ignorant of any unfair or disingenuous dealing, yet their integrity will not hinder the effect of the unjust possession of those whom they represent.<sup>2</sup>

## XV.

1992. *Estimate of Fruits and other Revenues Year by Year.* — In the restitution of revenues, the value whereof may rise or fall from one year to another, whether they consist in money, as the rents of a house, the farm of a mill, of a toll, and others of the like nature, or whether they be the fruits of the ground, or rent paid in corn, and other kinds; the arrears thereof are estimated on the foot of what the house or lands may have produced, and of the value of the kinds, according as the differences of the times may alter their price; or this liquidation is made according to the leases, if there be any that are not liable to suspicion.<sup>3</sup>

## XVI.

1993. *Restitution of the Revenues of Movable Things.* — Although the restitution of fruits be commonly understood only of the revenues of immoveable things, yet seeing there are movable things which produce revenues, we may apply to them the same rules, according as they are applicable thereto; as, for example, to the revenues which arise from animals, and to the profit

<sup>2</sup> *L. 2, in f. C. de fruct. lit. et exp.*

<sup>3</sup> *L. ult. D. de condict. tritic.* See the seventeenth article of the second section of the *Contract of Sale*

In France, this estimate is made in the manner prescribed by the ordinances, of which these are the provisions: —

In causes or actions, real and personal, which are commenced for lands and things immoveable, if there is restitution of fruits decreed, they shall be adjudged, not only from the time of contestation of suit, but also from the time that the party who is cast has been in delay, and has had knowledge of his unjust possession before the contestation of suit; nevertheless, according to the common way of making such estimates, which shall be settled according to the extract taken out of the registers of the ordinary jurisdictions. Ordinance of 1539, art. 94. In all our ordinary courts of judicature, whether general or particular, report shall be made every week of the value and common estimate of all kinds of great fruits, such as corn, wine, hay, and others of the like kind, &c., art. 102 and 103. And by the extract taken out of the registers of the said courts, and no otherwise, shall be proved for the future the value and estimate of the said fruits, as well in execution of decrees or sentences, as in other matters in which appraisements are necessary. Art. 104: If there is a sentence or decree for restitution of fruits, those of the last year shall be delivered in kind. All as to those of the preceding years, in liquidating them regard shall be had to the four seasons and the common price of every year, unless it shall have been otherwise directed by the judge, or agreed on between the parties. Ordinance of 1667, tit. 30, art. 1. See the other articles of the said thirtieth title.

which may be made of things which are let to hire by those who make a trade of it, such as an upholsterer, who lets out a suit of hangings.\*

## XVII.

1991. *There is no Interest due for the Fruits, till after a Demand.*—Whatever number of years the enjoyment for which restitution is to be made may have lasted, although the possessor may have known that what he possessed was not his own, yet there is due only the bare estimate of that enjoyment, without any interest for the value of the fruits of each year. But if a legal demand has been made of the said interest, the same will be due from the time of the demand. For the value of the said fruits, which are a real substance, is in lieu of a capital.\*

## TITLE VI.

## OF PROOFS AND PRESUMPTIONS, AND OF AN OATH.

1995. *What is a Proof.*—We call that a proof which convinces the mind of a truth: and as there are truths of divers sorts, so likewise there are different kinds of proofs. There are truths which are independent of the act of man, and of all sorts of events, and which are immutable and always the same. Thus, without meddling with the divine truths of religion, which are above all certainty, because of the authority of God who reveals them to us, and who makes us to feel and to love them, and also by reason of other different proofs of an infinite force, which it is not our business to treat of here, we have in sciences the knowledge of a great number of truths, which are certain and unchangeable: but there are others which are called truths of fact, that is, of what has been done, of what has happened; as, for example, that one has committed a robbery or a murder; that a testament is forged; that, in a fire, a thing which was saved out of it was deposited in the hands of a neighbour, who denies the de-

\* L. 19, D. de usur.

\* L. 15, D. de usur.; — l. 51, § 1, D. de hered. petit.; — l. 54, D. locat.

posit; that a possessor of a house or land has enjoyed it for the space of ten, twenty, or thirty years; and an infinite number of other facts of several natures.

1996. *What Truth is.* — *Different Sorts of Proofs.* — There is this which is common to all the different sorts of truths, that *truth is nothing else but that which is in reality*: and to know a truth is barely to know if a thing is, or is not, if it is such as is said, or if it is different. But the proofs which lead us to the knowledge of the truth in matters of fact are very different from those which establish the truths that are taught in sciences. For in sciences all the truths which may be known in them have their nature fixed and immovable, and are always the same necessarily, without any dependence on the act of man, or on any sort of change. Thus, the proofs of these truths are drawn from their own nature; and they are known either by their self-evidence, if they are first principles, and truths which are clear in themselves; or if they depend on other truths, their proofs consist in the connection that links them together, and which makes them to be known the one by the other, according as they are necessary consequences one of another. But in facts which might happen, or not happen, as depending on causes whereof the effects are uncertain, it is not by principles which are certain and unchangeable, on which depended that which has happened, that we can know it: but we must have recourse to proofs of another kind; and it is by other ways that we must discover this sort of truths. Thus, for example, if a man has been killed on the highway, being alone in the night-time, the truth of the cause of this murder, and the question to know who it is that has killed this man, will not depend on principles that are certain, and of which the evidence will lead us to the precise knowledge of the author of this crime, with a certainty like to that which demonstrations in sciences do produce. And it may likewise so fall out that it may be impossible to know it. But if it is discovered, it will be only by proofs that may be drawn from circumstances which shall happen to be linked together with this crime, and which will depend on events that have happened by accident, such as the casual encounter of some witnesses, and such signs and tokens as there may happen to be, conjectures, and presumptions. And even although there should chance to be two witnesses, beyond all manner of exception, who should say that they had seen the murderer, whom they knew, actually stabbing the said man, yet the cer-

tainty of such a proof is of another kind than that of the truth of a proposition clearly proved in a science, and has not the character of a demonstration; because it is not impossible that two witnesses may be deceived, or even that they may have a mind to deceive. But the force of this proof consists in this, that it is presumed from their good sense that they are not deceived themselves, and from their probity, that they do not intend to deceive others. So that this proof seems in effect to be grounded only on presumptions. However, these presumptions of truth which arise from the testimony of two witnesses are such, that the laws both of God and man have appointed them to be held as a sure proof, when the depositions agree with one another, and when the witnesses are persons against whom there lies no exception. And although it be true that this kind of proof has not the character of the certainty of a demonstration, because it is of quite another kind, yet nevertheless it has another sort of certainty which persuades fully, when the fidelity of the witnesses is well known; because this proof hath its foundation in the certainty of a truth which is a sure principle, and which is drawn from the very nature of man, and from the causes which govern his actions. According to this principle, it is certain that two persons who have reason, and who are not biased by some impression of hatred, revenge, interest, or some other passion, can never agree to bear false witness together in a court of justice, and that upon oath. And we may conclude certainly, from the natural principles of our actions, that witnesses who swear that they will say nothing but the truth do really tell it, if nothing changes in them the natural order. And although it be true, that the judges cannot always be sure that the witnesses are sincere, and that they give their evidence without interest and without passion, and that there are often even false witnesses; yet it would be unjust, as well as absurd, to give credit to no witness at all, because we cannot be certain of all witnesses that they do not lie. And it is a sufficient justification of the rule, which declares the testimony of two witnesses to be a sufficient proof, that it be true, in general, that it is the natural order for men to tell the truth which they know, when they cannot do otherwise without involving themselves in the guilt of perjury: and, in particular, if in the evidence that is given there appear no reason which may make us doubt of the fidelity of those who are produced as witnesses; for by that one judges that it is the truth which they have declared



1997. This same principle of the consequences that may be drawn from the natural causes which govern our actions, furnishes us likewise with other different proofs of facts, by the connection that is between the said causes and their effects. Thus, Solomon founded his judgment between the two women, upon the discovery which he made of the true mother, by the commotion and trouble which he foresaw the maternal affection would produce in her at the sight of the danger to which he feigned to expose the child. It may be remarked, on the nature of the proofs of facts in this example, and that of proofs by two witnesses, and we shall find it the same, likewise, in all the other kinds of proofs of facts, that although they be different from those which we may have of a truth in a science, yet there is still this common to all kinds of proofs in general, that their force consists in the certain consequence which we may draw from some truth that is known, to conclude from thence the truth of which we search the proof; whether it be that we draw a consequence from a cause to its effect, or from an effect to its cause, or from the connection of one thing with another.

1998. We have made here these remarks, to show by these principles of proofs, that, in all the questions where the matter is to know if a fact is proved, or if it is not, it is necessary to judge thereof by the certainty of the foundation on which the proof is built, and by the connection which the fact that is to be proved may have with that foundation. And as it happens very often, either that the foundation is not very sure, or that the fact in question is not necessarily linked with it, we find then, instead of proofs, only conjectures, which are not sufficient to establish a certain proof of the truth. Thus, for example, if, some days after a quarrel happening between two persons, one of them is found killed, and there is against the other no manner of proof besides the bare circumstance of that quarrel, we cannot from thence conclude with certainty that it was that person who committed the murder. For besides that enmities and quarrels are but seldom carried to such extremities, this murder may have had many other causes. So that, as there is no necessary connection between this death and that quarrel, this circumstance alone will not be sufficient to ground a sentence of condemnation upon, and it can only form a conjecture.

1999. *Two Sorts of Presumptions.* — It may be gathered from these remarks that there are two sorts of presumptions, some of

which are drawn by a necessary consequence from a principle that is certain; and when these sorts of presumptions are so strong that one may gather from them the certainty of the fact that is to be proved, without leaving any room for doubt, we give them the name of proofs, because they have the same effect, and do establish the truth of the fact which was in dispute. The other presumptions are all those which form only conjectures, without certainty; whether it be that they are drawn only from an uncertain foundation, or that the consequence which is drawn from a certain truth is not very sure.

2000. It is because of the difference between these two sorts of presumptions that the laws have appointed some of them to have the force of proofs, and have not left the judges at liberty to consider them only as bare conjectures, because in effect these sorts of presumptions are such that one sees in them a necessary connection between the truth of the fact that is to be proved, and the certainty of the facts from whence it follows. Thus, for instance, in France it is enacted by an edict of Henry II., that, if a woman has concealed her being with child, and is brought to bed privately, without any witness, and it be found that the child never was christened nor had any public burying, she shall be reputed to have murdered her child, and be punished with death.<sup>b</sup> And there are other sorts of presumptions which the law directs to be held as certain proofs; so that we ought to take good heed not to distinguish the sense of the word *presumptions* from that of *proofs* in such a manner as never to take presumptions to be proofs, seeing there are such presumptions as are sufficient to establish the proof of a fact. But whereas the word *proof* is taken for a full conviction, the word *presumption* is extended to all the consequences which may be drawn from the several arguments that may serve to prove a fact, whether it be that those consequences amount to the evidence which may make a full proof, or that they leave some doubt.

2001. We have thought it necessary to make here these reflections upon the nature of proofs and presumptions, in order to establish the principles of the rules concerning this matter, and to discover the natural causes of that which may establish the certainty of the truth of matters of fact. For it is by these princi-

<sup>b</sup> See the edict of Henry II. of the year 1556, touching women who have concealed their pregnancy. V. l. 34, ad leg. *Jul. de adul.*

ples that we are enabled to judge of the strength or weakness of the arguments which the parties bring to prove a fact. There remains only that we should distinguish the different manners in which facts are proved, and they may be reduced to five kinds; namely, writing, witnesses, presumptions, confession of the parties, and an oath. These five kinds shall be the subject-matter of so many sections. And because there are rules common to all the sorts of proofs, we shall explain in the first section those rules which are common to them all.

2002. We shall not set down among these rules such as regard only the proceedings observed in courts of justice in the matter of proofs; such as the formalities necessary to be observed for the proof of private writings, in examining and interrogating witnesses, in swearing them, taking down in writing their depositions, and receiving the objections that may be made against the witnesses by those against whom they are produced; the form of interrogating the parties upon facts, of taking the oath of the party, when the adversary is willing to have the matter in dispute decided by it; and the other different proceedings, whether it be in civil or criminal matters. For all these things relate to the order of judicial proceedings, and therefore do not belong to this place, and are regulated by the ordinances, for the most part otherwise than they were by the Roman law. And here we shall explain only the essential rules which relate to the nature and use of the several sorts of proofs and presumptions.

## SECTION I.

### OF PROOFS IN GENERAL.

#### ART. I.

2003. *Definition of Proofs.*—By judicial proofs is meant the ways which the law has prescribed for discovering and for establishing with certainty the truth of a matter of fact that is contested.\*

#### II.

2004. *Proofs are of Two Sorts.*—There are two sorts of proofs; those which the law appoints to be held as certain, and those

\* L. 4, D. de fid. instr.;—l. 11, D. de testib.

whereof the effect is left to the discretion of the judge. Thus, the law will have the uniform depositions of witnesses that are unexceptionable, and who are in the number required by law, to be received as a certain proof of a crime or other fact. Thus, the law establishes it for a sure proof of an agreement, if the contract is signed by the parties, or, if they have not been able, or could not write, if it is signed either by a notary and two witnesses, or by two notaries without any witness, according to the different usages of the places. But when there is nothing else but presumptions, tokens, conjectures, imperfect evidence, or other sorts of proofs which the law has not directed to be held for certain, it leaves it to the discretion of the judge to discern what may be received as proofs, and what ought not to have that effect.<sup>b</sup>

### III.

2005. *Facts which have no Need of Proof.* — The use of proofs does not concern facts that are naturally certain, and whereof the truth is always presumed, if the contrary is not proved. But it respects only facts which are uncertain, and of which the truth is not presumed unless it be proved. Thus, for example, he who demands a succession or a legacy, by virtue of a testament, has no occasion to prove that the testator was in his right senses when he made the testament, in order to establish from thence the validity of the testament. For it is naturally presumed that every one has the use of his reason. But the heir of blood, or next of kin, who, in order to annul the said testament, alleges the insanity of the testator, ought to prove that fact. Thus, he who demands to be relieved from an obligation, because of his minority, ought to prove his age.<sup>c</sup> Thus, he who pretends to be proprietor of a house, or land which is in the possession of another person, ought to make proof of it.<sup>d</sup>

### IV.

2006. *He who advances a Fact ought to prove it.* — It follows from the preceding rule, that, in all the cases of a fact that is contested, if it is such that it be necessary to make proof of it, it lies always on the person who advances it to prove it. Thus, all those who make any demands, that are founded upon some matter of

<sup>b</sup> See the fifth article of the fourth section.

<sup>c</sup> L. 9, C. de probat.

<sup>d</sup> L. 2, C. de probat. <sup>e</sup> See the seventh article of the fourth section.

ct, ought to prove the truth of the fact, if it is contested. Thus, e who demands a legacy bequeathed by a codicil ought to prove the codicil to be true. This is the reason why it is commonly said, that it is incumbent on the plaintiff to prove his fact.<sup>a</sup>

## V.

2007. *The Defendant ought to prove the Facts on which he grounds his Defence.*—As the plaintiffs are obliged to prove the facts on which they ground their demands, so likewise, if the defendants on their part allege facts which they make use of as a foundation of their defences, they ought to prove them. Thus, a debtor, who, confessing the debt, alleges for his defence that he has paid it, ought to make proof of the payment. And although he be defendant in the suit, yet he is considered in regard of this fact as plaintiff.<sup>f</sup>

## VI.

2008. *Each Party may on his Part prove the Contrary of the Facts alleged by the Adverse Party.*—Although the person against whom one alleges a fact which it is necessary to prove be not obliged on his part to prove the contrary;<sup>g</sup> yet he may, nevertheless, if he pleases, the better to establish his right, prove the truth of the opposite fact.<sup>h</sup>

## VII.

2009. *The Parties have mutual Liberty to allege Facts, and to prove them.*—It is equally free both for the plaintiff and defendant to allege the facts which may serve as a foundation to build their right upon. And each of them is admitted, both to prove the facts which he himself alleges, and also to prove the contrary of the facts alleged by his adversary.<sup>i</sup>

## VIII.

2010. *Provided the Facts have Relation to the Affair in Hand.*—The liberty of alleging and proving facts does not extend to all

<sup>a</sup> L. 21, D. de probat.; — l. 2, eod.; — l. 4, in f. C. de edendo. See the seventh article of the fourth section.

<sup>f</sup> L. 19, D. de probat.; — l. 1, D. de except. præs. et præjud., — l. 1, C. de probat.

<sup>g</sup> L. 8, C. de probat.

<sup>h</sup> L. 14, D. de probat.

<sup>i</sup> This is a consequence of the preceding articles. See the following article.

sorts of facts indifferently; but the judge ought to receive the proof only of those that are called pertinent, or relevant; that is, from which one may draw the consequences which may serve to establish the right of the person who alleges the said facts: and he ought, on the contrary, to reject those facts of which the proof, if they were true, would be useless. Thus, for instance, he who should pretend to evict a house or land from the person who had purchased it, believing himself to be proprietor thereof, because he had lent the money for the purchase, would demand to no purpose to be admitted to prove this fact; and this proof would be of no manner of use to his pretension, seeing the property of the house or land does not belong to him who advanced the money to the purchaser.<sup>1</sup>

## IX.

2011. *A Thing adjudged holds the Place of Truth.*— Things that are adjudged hold the place of truth with regard to those between whom they are adjudged, if they have not appealed, or if there lies no appeal from the sentence. Thus, for example, if, in the case of two brothers claiming each of them his share in their father's inheritance, one of them has been by sentence declared to be a professed monk, this fact will be held for true, and well proved: and he will be incapable of having a share in the inheritance.<sup>m</sup> But the facts which have been formerly adjudged between other persons than those who contest them at present are undecided with respect to these, and must be proved; for they might have reasons to offer which had not been urged by the others.<sup>n</sup>

## X.

2012. *The Effect of the Proofs depends on the Prudence of the Judge.*— In all the kinds of proofs, whether by witnesses, or by writing, or by other ways, the question whether a fact is proved, or is not, depends always on the prudence of the judge, who ought to discern whether the depositions of the witnesses, or the other sorts of proofs, be sufficient or not.<sup>o</sup> And this implies two sorts

<sup>1</sup> L. 21, C. de probat. See the fourth article of the fifth section.

<sup>m</sup> L. 207, D. de reg. jur.

<sup>n</sup> L. 63, D. de re jud.; — tot. tit. C. quib. res jud. non noc.; — et tit. C. inter al. act. vel jud. al. n. noc.

<sup>o</sup> L. 3, § 2, D. de testib.; — d. § in fine.

of discussion, which shall be explained in the two following articles.

## XL

2013. *In Proofs it is necessary to examine, First, if they are according to Form.* — The first inquiry that a judge ought to make, in order to know what ought to be the effect of a proof, and what regard ought to be had to it, is concerning the formalities thereof; that is, if the proof be according to the order prescribed by law. Thus, in the cases where proofs by witnesses may be received, it is necessary to inquire if they are in the number which the law demands, if they have given their testimony by word of mouth, if there be no cause which may render their evidence suspected, if they have been summoned, if they have been sworn; and, in a word, if their depositions have been accompanied with all the formalities which the law requires.<sup>p</sup> Thus, when it is by a writing that one pretends to prove a fact, it is necessary to examine if it be an original, or a copy; if it is an act made in presence of a public notary, and of which the date is certain; or if it is only a private writing, signed only by the parties, and to which they may have put what date they pleased; and if the act has the formalities required to make it authentic, and if it be such as ought to be received for a proof.<sup>q</sup>

## XII.

2014. *Secondly, If they are Concluding.* — The second examination of the proofs consists in discerning that which results from them for establishing the truth of the facts which were to be proved, whether it be by witnesses, or by writing, or otherwise. Thus, as for the depositions of witnesses, the judge examines if the facts to which they depose are the same which ought to have been proved, or if they are other facts from which one may be able to draw certain consequences of the truth of the facts in dispute: if the depositions agree one with the other, or, in case they differ, whether the difference can be reconciled so as to make a proof, or whether it leaves the thing uncertain; if the multitude of witnesses leaves no manner of doubt; if, among several witnesses who depose differently, the probity and authority of some of them give more

<sup>p</sup> L. 21, § 3, *D. de testib.*; — v. l. 3, *cod.*; — l. 3, § 3, *D. de testib.* See the third section.

<sup>q</sup> L. 2, *D. de fide instr.* See the second section.

weight to their testimony; if there is no variation in a deposition; if the facts are notoriously evident, and confirmed by public fame, in the cases where these circumstances may be considered; if some of the witnesses be suspected of partiality, by reason of favor or hatred to one of the parties. Thus, in proofs by writing, and in all the other kinds of proofs, it depends on the prudence of the judge to discern that which may suffice for establishing the truth of a fact, and that which leaves it doubtful; to consider the relation and connection which the facts resulting from the proofs may have with those which are to be proved; to examine if the proofs are concluding, or if they are only conjectures, signs, and presumptions, and what regard ought to be had to them; and, in a word, to judge of the effect of the proofs by all the different views which one may have from the knowledge of the rules, and from the reflections on the facts and circumstances.\*

## SECTION II.

### OF PROOFS BY WRITING.

2015. The force of proofs by writing consists in this, that men have agreed to preserve by writing the remembrance of things that have been transacted, and to perpetuate the memory of them to posterity, whether it be that they may serve as rules to the parties themselves, or as a perpetual proof of what is written. Thus, covenants are put down in writing, in order to preserve the memory of what the contracting parties have bound themselves to, and to make to themselves thereby a fixed and unchangeable law, as to what has been agreed on. • Thus, testaments are written, that a remembrance may be kept of what has been ordered by the testator, who had a right to dispose of his goods, and that it may serve as a rule to his executor, and to the persons to whom he has left legacies. Thus, it is thought fit to write sentences and decrees of courts, edicts, ordinances, and every thing which is to serve as a title or a law. Thus, it is customary to write down in public registers marriages, christenings, and other acts which ought to be recorded; and other the like registers are kept as a public and perpetual repository of the truth of the acts which are there recorded.

\* L. 3, § 2, *D. de testib.*; — L. 2, *cod.*; — L. 21, § 3, *cod.*; — l. 19, *C. de rei vind.*



2016. The written contract, therefore, is a proof of the engagements of those who have contracted, and the written testament is a proof of the will of him who has made it. And these proofs are in the place of truths to the persons whom they concern. Thus, a written contract serves as a proof against the contractors, against their heirs, and against all those who represent them, and who succeed to their engagements. Thus, a testament proves the truth of the dispositions made by the testator, and obliges the executors and legatees to execute them.

2017. It is easy to comprehend how necessary the use of writing has been, for preserving the memory of agreements, of testaments, and of other acts of all kinds; and that there can be no better proof of them, seeing the writing preserves without change or alteration whatever is set down therein, and expresses the intention of the persons by their own proper testimony and evidence. But seeing all persons cannot write, it has been thought fit, for the convenience of those who cannot write, to establish public officers, who are called notaries public, and whose function is such that the acts signed either by two notaries, without any witness, or by one notary and witnesses, according to the different usages of places, make a legal proof of the truth of that which is written between the persons who cannot either write or read. And as to persons who can write, their sign manual, without the presence of a notary, makes likewise a proof of the truth of that which is written: but with this difference between acts written without the presence of notaries, which are called private writings, and those which are signed by notaries; that these are received as a proof in courts of justice, and prove two facts. One is, that the act has been sped between the persons who are named in it at the time and in the place there specified; and the other is, that the intentions of the parties concerned are there explained. And the authority of this proof is founded on the public function of notaries, who are established for this very purpose, to render the acts which they sign authentic. But private writings do not even prove by whom they are written, and it is necessary to verify them; that is, to prove by whom they are signed.

2018. The great facility there is of writing covenants, and the infinite number of inconveniences that attend the admission of the proof of unwritten covenants, in the manner that it was received by the Roman law, have been the motives which induced the kings of France to make the ordinances whereby it is pro-

hibited to receive other proofs than writing for covenants, where the sum exceeds one hundred livres, as has been remarked in another place.<sup>a</sup> And it is for the same reason that the ordinances have directed that there should be kept public registers of christenings, marriages, deaths and burials, ordinations, admissions into any religious order, to the end that people may easily come at the certain proof of these sorts of facts.<sup>b</sup> Which does not hinder but that, in case the said registers should happen to be lost or destroyed, one may be allowed to make use of the other kinds of proofs.<sup>c</sup>

### ART. I.

2019. *What are Written Proofs.*—Proofs by writing are those which are drawn from some written act, such as a contract, a testament, or other writing, which contains the truth of the fact in question.<sup>a</sup>

### II.

2020. *Use of these Proofs.*—People put down in writing contracts, testaments, and other acts, in order to preserve the proof of what has been done by the testimony of the persons themselves, who express therein their intentions.<sup>b</sup>

### III.

2021. *Written Proofs are the strongest.*—Seeing the force and validity of proofs by writing consists in this, that they are a testimony which the persons who are parties to the said acts give against themselves, and a testimony which is unchangeable, there

<sup>a</sup> See the remark on the twelfth article of the first section of *Covenants* in general. It is necessary to observe, with respect to this prohibition by the ordinances of France against receiving the proof of covenants by witnesses, that it does not extend to things deposited in a case of necessity, nor to the other cases explained in the third and fourth articles of the twentieth title of the ordinance of the month of April, 1667.

<sup>b</sup> Ordinance of 1539, art. 50 and 51; of *Blois*, art. 181; of *Moulins*, art. 55. Declaration in July, 1556, art. 11. Ordinance of 1667, tit. 20, art. 7, 8, and 15.

<sup>c</sup> Ordinance of 1667, tit. 20, art. 14; — l. 2, § 1, *D. de excus.*

<sup>a</sup> L. 1, *D. de fide inst.*

<sup>b</sup> L. 4, *D. de fide inst.*; — l. 4, *D. de pignor.* Written acts are of several sorts, and they may be reduced to four kinds: private writings, acts made in the presence of public notaries, those which are made in courts of justice, such as the naming of a tutor or guardian, and those which are made before other public persons, as matrimony in the presence of a clergyman, the promotion to holy orders, and other acts, of which public registers are kept.

can be no better proof of what has passed between them, than what they themselves have expressed of the matter.\*

#### IV.

2022. *No Proofs are received against Writing.*—This strength of written proofs is the reason why we do not receive contrary proofs by witnesses.<sup>a</sup> Thus, he who would call in question a testament that is made according to form, pretending to prove by witnesses, either that the testator had altered his will, or that his intention was otherwise, would not be admitted to make such a proof; nor he who should offer to prove by witnesses that he had not received a sum of money for which he had given an acquittance.

#### V.

2023. *Unless it be pretended that the Writing is Forged.*—We must not extend the rule explained in the preceding article to the cases where the truth of an act is called in question; as if it be pretended that it is forged, or that it has been made through the impression of fear and violence, which render it null. For the proof which is drawn from a written act hath for its foundation the fidelity of the testimony which the writing gives of the truth of what it contains, and when this fidelity is called in question, the writing loseth its force. Thus, he who pretends to prove that his hand has been counterfeited, in a writing that appears to be signed by him, ought to be received to prove this fact.<sup>b</sup> Thus, he who pretends that an obligation has been extorted from him by force and violence may make proof of it.<sup>c</sup> And it would be the same thing in all the cases where the written act should be opposed on the head of some vice which might annul it, as on the account of some fraud, or some error which might have this effect.<sup>d</sup> Or if it were an act counterfeited in order to color some fraud, such as a disposition made to a third person, whose name is made use of for transmitting some liberality to another person, who by law is incapable of receiving it directly in his own name,

<sup>a</sup> L. 15, C. de non num. pecu.

<sup>b</sup> L. 1, C. de testib.; — l. 10, D. de probat. See the thirteenth article of this section, and the remarks at the end of the preamble to this section.

<sup>c</sup> L. 23, D. ad leg. Corn. de fals.

<sup>d</sup> L. 3, D. quod metus causa.

<sup>e</sup> See the title of the *Vices of Covenants*.

or for acquiring to the said person a thing whereof the commerce was prohibited to him.<sup>1</sup>

## VI.

2024. *Written Acts are not received as Proof, unless they be in due Form.*—Written acts have not the force of proofs, except they have all the formalities which the law prescribes. For these formalities are necessary precautions for qualifying them to serve as proofs, and are marks by which the law points out to us what written acts it receives as proofs, and what it rejects. Thus, for example, in the provinces where it is necessary to have seven witnesses to a testament, it would be to no purpose to produce a testament which had only six witnesses, although they were persons of ever so great integrity.<sup>1</sup> For besides that it is necessary to observe the prescription of the law, the practice of authorizing a testament barely in consideration of the probity of the witnesses would be opening a door to a thousand inconveniences. Thus, for another example, a contract which the parties intended to execute in the presence of a public notary and witnesses would be without effect, if it were not signed, both by the parties themselves, and by the witnesses who could write their names, and by the notary. Thus, a private writing which is only written, but not signed by the party, would make no proof.<sup>1</sup>

## VII.

2025. *The Witnesses to a Written Act will not be received to prove the Contrary.*—When the written acts are according to form, not only are contrary proofs not received, but even not so much as a hearing is granted to one of the parties who should desire to have the witnesses to an act examined judicially, in order to make some change in the act, or to explain it. For besides the danger of some infidelity on the part of the witnesses, the act having been committed to writing only with design that it might remain unchangeable, its force consists in remaining always the same as it was made at first.<sup>2</sup>

<sup>1</sup> L. 2, C. plus val. quod dgitur; — l. un. § 3, C. de contr. jud.; — v. l. 46, D. de contr. empt.; — v. l. 10, D. de his q. ut ind.; — ll. 1, 3, 40, D. de jure fisci. See the nineteenth and twentieth articles of the first section of the *Rules of Law*, the preamble to the eighth section of the *Contract of Sale*, and the first article of the same section.

<sup>1</sup> § 3, *Inst. de testamentis ordin.*

<sup>1</sup> L. 17, C. de fide instr. See the fifteenth article of the first section of *Covenants*.

<sup>2</sup> L. 1, C. de testib. See the fourth and fifth articles.

## VIII.

2026. *Written Acts prove only against those who are Parties to them.*—The authority of proofs which are drawn from written acts hath its effect against the persons whose consent is therein expressed, as being parties thereto, and against their successors, and those who have their rights, or who represent them; and these acts serve as a rule and a proof against the said persons.<sup>a</sup> But they can be of no prejudice to third persons, whose interest may be thereby injured.<sup>b</sup> And if it were said, for example, in a testament, that a land or tenement devised by the testator did belong to him, this declaration would be of no manner of prejudice to the person who should pretend to be owner of the said land or tenement.

## IX.

2027. *No Man can by himself make a Title to himself.*—Nobody can acquire to himself a right, nor make himself creditor to another, by acts which he himself may make at his pleasure. Thus, for instance, a judge will not pronounce sentence, upon the bare authority of a journal or day-book of any person, which mentions a sum of money to be owing to him by another, that the said sum is due, if there be no other proof of it, with what exactness soever the book may be kept, and how great soever may be the integrity of the person who wrote it.<sup>c</sup>

## X.

2028. *It is by the Original Acts that we ought to examine the Proofs.*—The truth of written acts is made out by the acts themselves; that is, by a sight of the originals. And if the person against whom a copy only is produced demands a sight of the original, it cannot be refused him, whatever quality the person may be of who makes use only of a copy.<sup>d</sup>

<sup>a</sup> L. 13, C. de non num. pecu. See the third article.

<sup>b</sup> L. 10, D. de jurej. See the following article.

<sup>c</sup> L. 6, C. de probat.; — l. 7, C. eod.; — Nov. 48, c. 1, § 1; — l. 5, C. de conv. fisc. debit.

<sup>d</sup> L. 2, D. de fide instr. The engrossed copies of contracts, testaments, and other acts, of which the minutes, which are the true originals, have been deposited in the hands of public notaries, are in the place of originals, and are not called copies, for they are signed by the notaries themselves. But if there were any accusation of forgery, or if it were necessary to amend some error in the engrossed copy, it would be necessary in that case that the minute itself should be produced.

## XI.

2029. *Cases where the Copies of Acts and other Proofs may serve when the Originals cannot be had.*—If the original act or instrument is lost, as if it has perished by fire, or other accident, one may in that case prove the contents of the same, either by copies thereof duly collated, or by other proofs, if there be any such, which the judge in his discretion may think fit to be received.\* Thus, for example, mention being made of a bond, in the inventory of the goods of a person deceased, the guardian of the heir who is under age might make use of the said inventory to prove the truth of the said bond, if it should happen to be lost through some accident.† Thus, when a creditor receives from his debtor payment of a rent, if he takes from him a copy of the acquittance which he gives him, and if the said copy, which is called a duplicate of the acquittance, be signed by his debtor, it may serve as a proof of his title to the rent, if the title chances to be lost. For it is the debtor himself who acknowledges the truth of the creditor's title by this act which he signs.‡

## XII.

2030. *When Mention is made of one Act in another.*—It is not ground enough for demanding a debt, or claiming any other right, that the title thereof be set forth in some other act which makes mention of it. For this bare mention of it makes no proof, if the title itself does not appear; unless the person against whom one would make use of such a declaration had been a party to the act which contains the said declaration; or that because of other considerations it should appear to be equitable, and conformable to the intention of the law, that such a declaration should be received as a proof; as in the case of the preceding article.¶

## XIII.

2031. *Acts that contradict one another.*—If one and the same person makes use of two written acts or titles, whereof the one contradicts the other, they destroy one another mutually, by the

\* L. 5, C. de fide instrum.; — l. 7, C. eod.; — l. 11, C. eod.

† L. 57, D. de adm. et per tut.

‡ L. 19, C. de fide instr.

¶ Nov. 119, c. 3; — l. 37, § 5, D. de legat. 3; — l. ult. D. de probat

opposite consequences which will be drawn equally from the one and the other.\*

#### XIV.

2032. *Counter-Letters.*— We must not comprehend under the rule explained in the preceding article the acts of which there are counter-letters that are contrary thereto, or which make some change therein. For the counter-letters are acts which those who treat together separate from their contracts, when they have no mind to comprehend in them what they reserve to be explained apart in these counter-letters. So that the contrariety between a contract and a counter-letter does not destroy the former, but only restrains it, and makes therein such other changes and alterations as the parties had a mind to make. Thus, for example, if in a contract of sale the seller obliges himself to warranty against all manner of evictions, and the buyer declares in a counter-letter that he consents that the seller shall be bound only to warrant against his own acts and promises, the contrariety of these two covenants will not have the effect to annul either the one or the other. For one sees that the intention of the parties is, that the contract should subsist with the condition regulated by the counter-letter. Thus, he who, obliging himself for a sum of money, takes a declaration from the creditor, whereby he consents that the obligation shall have its effect only for half the sum, will owe no more than what shall have been agreed on by this last writing. And although the counter-letters be of the same date with the acts which are explained therein, and which are changed thereby, yet they are considered as a second will, which revokes the former, or derogates from it.

#### XV.

2033. *Counter-Letters cannot prejudice Third Persons.*— The rule explained in the foregoing article is not to be understood indifferently of all sorts of counter-letters, but is restrained to such as may have their effect among the contracting parties, without prejudice to the interest of any other third person. And counter-letters, and all secret acts which derogate from contracts, or which make any change in them, have no manner of effect with regard

\* L. 14, C. de fid. instr. See the following article.

† L. 27, § 5, D. de pact. See the following article.

to third persons, whose interest may be prejudiced thereby.\* Thus, for example, if a father, in marrying his son, had given him as a marriage settlement, either a sum of money, or an estate in land, or an office, taking from him a counter-letter, declaring that the gift should be valid only for a lesser sum, or that the son should give back out of the land, or out of the office, a sum of money, such as they had agreed upon among themselves; this counter-letter would have no effect with regard to the wife, and the children that should be born of the said marriage, nor with regard to other third persons who might be any ways interested therein, such as the creditors of this son. For this agreement would be an infidelity contrary to good manners, and would destroy the fidelity and sincerity that is due, not only to the wife and her parents, who would not have consented to the marriage on the conditions of this counter-letter, but to all the persons whom this fraud may any way concern. And it is for the public interest to restrain the bad use which private persons may make of the facility they have in their families to collude together in order to deceive others by such like clandestine acts.\*

### SECTION III.

#### OF PROOFS BY WITNESSES.

2034. *The Subject-Matter of this Section.* — We do not speak here of the proof which witnesses make in contracts, in testaments, and in the other acts where the law requires the presence of some witnesses to confirm the truth of what is there transacted; for this kind of proof is comprehended in the proofs by writing, of which we have treated in the foregoing section. And in this section we mean to speak only of the proof that is made by the depositions of witnesses who are judicially examined, that the judge may learn from their mouths the truth of facts for which no written proofs can be produced, or where the proofs which may be alleged are not sufficient. Thus, for example, if a fair and honest possessor of an estate, who knows of no better right to it than his own,

\* L. 10, D. de jurej.; — l. 74, D. de reg. jur.; — l. 2, C. *plus val. quod ag. quam quod sum. conc.*; — l. 4, *cod.*

\* L. 27, C. de donation. Although this reference be to a law which has no relation to counter-letters, yet it may be applied to them.



and yet has no title to produce, but has possessed it during the time necessary for prescription, is disturbed in his possession, and has no writings to prove it, or has only wherewithal to prove his possession for part of the time which he has enjoyed it; as if he has leases of some years, or some acquittances for quitrents which he has paid as possessor; he may produce witnesses to declare what they know of the said possession, and of its duration; and his adverse party may likewise on his part prove the contrary. Thus, one proves by witnesses all the other facts which it may be just and necessary to prove, such as accusations in crimes, and facts contested in civil matters, except such as the law does not allow to be proved by witnesses, as has been remarked at the end of the preamble to the foregoing section.

2035. There is this difference between the proof by witnesses, which is the subject-matter of this section, and the proofs which witnesses make in written acts; that in the ~~and~~ acts the witnesses are persons which one has the liberty to choose to be present at them, and they ought to be in the number regulated by law, and of the quality which it prescribes; whereas in the proofs which are to be treated of in this section, the witnesses are persons who happen by chance to have knowledge of the facts which one would prove, without having been chosen and called upon to see what passes, and to remember it. And this is the reason why, in informations in criminal prosecutions, and in trials concerning civil matters, the judges admit the depositions of witnesses who would not be allowed of as proper witnesses to written acts. Thus, for example, women, who cannot be witnesses in a testament or in a contract, are admitted to give evidence, in criminal prosecutions, and trials in civil causes.

2036. *Examination of Witnesses ad futuram rei memoriam abolished in France.*— We shall put down nothing in the articles of this section touching that kind of proof by witnesses which was called examination of witnesses *ad futuram rei memoriam*, which was in use under the Roman law, and which was likewise observed in France before the ordinance of 1667, which abolished the use thereof.\* But this remark is made here only to give the reader an idea of that sort of examination of witnesses which served to preserve their evidence to posterity, and to inform him that the same is abolished in France.

\* Ordinance of 1667, tit. 13.

2037. This examination of witnesses, in order to preserve their testimony to futurity, was used in the cases where any one foreseeing that he might have occasion for a proof by witnesses, and fearing lest they should die, or that other changes should happen which might deprive him of his proof before his lawsuit was so far advanced that he might be admitted to make his proof, or that the judge could examine his witnesses, he demanded leave of the judge to have them examined before the time, that their evidence might be thereby perpetuated to futurity.<sup>b</sup> But this precaution, which is attended with many inconveniences, has been judged useless likewise for other reasons. For those who may be in haste to make their proofs may take their measures accordingly; may make their demands, and allege their facts, in order to have the proof of them decreed, if it be necessary, without having recourse to a usage that is inconvenient and full of uncertainty.

2038. *The General Inquest about Customs abolished in France.*—It may not be amiss to observe here, in passing, that the same ordinance of 1667 hath also abolished in France another kind of examination of witnesses, which was called *enquête par turbès*,<sup>c</sup> or a general inquest, and which was used in questions relating to the interpretation of some custom. The usage of these inquests was founded on this, that the particular dispositions of customs were considered as facts.<sup>d</sup> So that they received proof by witnesses of the usage and interpretation of some article of a custom. They called these inquests *par turbès*, because ten witnesses were only reckoned as one; and these witnesses were chosen from among the officers of the places, and the advocates, who were the likeliest persons to know what was the usage and practice as to the dispositions of their customs. But these inquests were attended with an infinite number of inconveniences, as may easily be perceived; and the superior judges have better ways to find out the sense and meaning of customs, and to interpret that which may require an explanation.

#### ART. I.

2039. *Witnesses, and their Evidences.*—Witnesses are persons who are summoned to appear in judgment, in order to declare,

<sup>b</sup> L. 40, D. ad leg. Aquil.; — l. 3, § 5, D. de carbon. ed.

<sup>c</sup> Ordinance of 1667, tit. 13.

<sup>d</sup> See the eleventh chapter of the *Treatise of Laws*, no. 20, towards the end.

what they know of the truth of the facts contested between the parties. And the declaration which they make of the matter is their evidence.<sup>a</sup>

## II.

2040. *Use of Witnesses in all Matters.* — The use of evidences is infinite, according to the infinite number of events which may render the proof of a fact necessary, whether it be in civil matters or in criminal.<sup>b</sup>

## III.

2041. *Who may be a Witness.* — All persons of both sexes may be witnesses, if there be no exception against them regulated by some law.<sup>c</sup> Thus, for example, children and madmen cannot be admitted as witnesses, nor persons whose reputation has received some blemish, either by a sentence of condemnation in a court of justice, unless they be restored again to their good name, or by the infamy of their profession; nor those whom other causes may render incapable of giving evidence,<sup>d</sup> as shall be shown in the sequel of this section.

## IV.

2042. *Two Qualities in Witnesses.* — The proofs which are drawn from evidences depend chiefly on two qualities that are necessary in the witnesses: probity,<sup>e</sup> which engages them to say nothing but the truth; and a steadiness in relating the circumstances of the fact, which may show the witnesses to have been careful and exact in observing and retaining them.<sup>f</sup> And it is for want of one or the other of these qualities that evidences are suspected and rejected. And this depends on the rules which follow.

## V.

2043. *Witnesses who are suspected.* — Whatever proves the want of probity in a witness is sufficient to make his evidence to be rejected. Thus, we do not receive the evidence of a person condemned by a court of justice for calumny, or forgery, or for having

<sup>a</sup> L. 11, *D. de testib.*

<sup>b</sup> L. 1, *D. de testib.*

<sup>c</sup> L. 20, § 6, *D. qui test. fac. poss.*; — l. 18, *D. de testib.*

<sup>d</sup> L. 1, § 1, *D. de testib.*; — l. 3, § 5, *in f. D. de testib.*; — l. 20, *cod.*

<sup>e</sup> L. 2, *D. de testib.*; — l. 5, *C. de testib.*

<sup>f</sup> L. 1, *D. de testib.*

borne false witness, or for writing a defamatory libel, or for other crimes.<sup>5</sup> For these condemnations cast a blemish on the honor of the person, and make him forfeit the reputation of probity. And it would be the same thing, and that with much more reason, if it were proved that the witness had received money to give his evidence.<sup>6</sup>

## VI.

2044. *Witnesses who are interested.*—If the witness has any interest in the fact concerning which he is desired to give evidence, he will be rejected.<sup>1</sup> For one cannot be sure that he will make a declaration contrary to his own interest.

## VII.

2045. *Witnesses engaged in the same Interest with the Party.*—The same reason which serves for rejecting the testimony of persons interested in the facts that are to be proved makes the testimony likewise of the father in the cause of the son to be rejected, as also that of the son in the cause of the father. For the interest of the one touches the other, as his own proper interest. And although the father should offer to give evidence against his son, or the son against his father, they would not be admitted to do it. For this affectation and forwardness would render them suspected of having an intention either to favor, or to hurt.<sup>1</sup>

## VIII.

2046. *Witnesses who are Relations, or Allies.*—As we reject the testimony of persons who are interested in the facts which are to be proved, or who take part in the interest of those whom the said facts concern, so neither do we receive the evidence of those who are related by consanguinity, or by affinity, to the persons interested in the said facts. And if there should be any enmity between those persons and the witnesses who are their relations or allies, such witnesses ought to be rejected with greater reason. And they may on their part refuse to give their evidences, especially in criminal prosecutions. We may reckon in the number of allies, with respect to the use of this rule, those who are only so

<sup>5</sup> L. 13, *D. de testib.*; — l. 3, § 5, *cod.*; — l. 15, *cod.*; — §. 21, *cod.*

<sup>6</sup> L. 3, § 5, *cod.*

<sup>1</sup> L. 10, *D. de testib.*; — l. 10, *C. cod.*

<sup>1</sup> L. 9, *D. de testib.*; — l. 6, *C. de testib.*

by sponsals, the marriage not being, as yet, accomplished.<sup>o</sup> And we must understand consanguinity and affinity in the extent of the degrees regulated by law.<sup>a</sup>

## IX.

2047. *Witnesses who are Friends.*—The ties<sup>b</sup> made by strict friendships, or engagements of familiarity, may, likewise render suspected the testimony of a friend in the cause of his friend.<sup>c</sup> And this depends on the prudence of the judge, according to the quality of the tie of friendship, and that of the facts and circumstances.

## X.

2048. *Witnesses who are Enemies.*—The enmities that are between witnesses and the persons against whom they depose are just causes for doubting of the fidelity of their testimony. For we ought to mistrust that their passion may lead them to make a declaration prejudicial to the interest of their enemy. And unless their evidence were accompanied with some other proof, it would be suspicious. So that we ought to judge by the circumstances of the quality of the persons, of the causes and consequences of the enmity, and of what results from the other proofs, what regard ought to be had to the fact of enmity.<sup>d</sup>

## XI.

2049. *Witnesses who are Domestic, and depend on the Party.*—The persons who have a dependence on the party who would make use of their testimony, such as menial servants, being suspected to favor the interest of their master, and to declare only what he desires, their evidence ought to be rejected.<sup>e</sup>

## XII.

2050. *Witnesses who waver in their Depositions.*—It is not enough to establish an evidence beyond all exception, that the

<sup>a</sup> L. 4, *D. de testib* ; — l. 3, *cod*.

<sup>b</sup> In France, by the ordinance of 1667, tit. 22, art. 11, the testimony of relations and allies of the parties, even down to the children of second-cousins inclusively, is rejected in civil matters, whether it be for or against them.

<sup>c</sup> L. 3, *D. de testib* ; — l. 223, § 1, *D. de verb. sign*.

<sup>d</sup> L. 3, *D. de testib* ; — l. 1, § 24 et 25, *D. de quæst* ; — v. Nov. 90, c. 7 ; — l. 17, *C. de test*.

<sup>e</sup> L. 6, *D. de testib* ; — l. 24, *cod* ; — l. 3, *C. cod*.

probity of the witness be not called in question; it is moreover necessary, that his declaration be steady and firm. For if he varies in his account, deposing circumstances and facts that are different, or even contrary; or if he waver in his deposition, and be himself in doubt of the fact which he relates; this uncertainty and these variations rendering his evidence uncertain, they will cause it to be rejected.<sup>2</sup>

## XIII.

• 2051. *There must be Two Witnesses to make a Proof.*—In all the cases where proof by witnesses may be received, it is necessary that there be two of them at least; and that number may suffice, except in cases where the law demands a greater. But one single witness, of what quality soever he may be, makes no proof.<sup>3</sup>

## XIV.

2052. *One may produce many Witnesses.*—Although two witnesses be sufficient to prove a fact, yet seeing this proof consists in the conformity of their depositions, and that it often happens that the declarations of two witnesses do not agree in all points, or that some essential circumstances are known only to one of the witnesses, the other being ignorant of them, and that likewise it may so fall out, that there may be some just objection against one of the witnesses, or even against them both; for these reasons a greater number of witnesses may be examined, and even several out of one and the same house, such as the father and children, that the evidence of the one may make up what is defective in the testimony of the others, and that all of them together may make up an entire proof of the truth. But the liberty of producing many witnesses ought to be restrained by the prudence of the judge, if the law has set no bounds to it.<sup>4</sup>

## XV.

2053. *Several Views by which we are to judge of Proofs by Witnesses.*—It is necessary to add to all these rules, in relation to

<sup>2</sup> L. 1, D. de testib.; — l. 2, eod.

<sup>3</sup> L. 12, D. de testib.; — l. 9, § 1, C. de testib.

<sup>4</sup> L. 1, § 2, D. de testib.; — l. 17, eod. By the ordinances of France it is prohibited to examine more than ten witnesses to each fact in civil matters: Ordinance of 1446, art. 32; of 1498, art. 13; of 1535, chap. 7, art. 4. Ordinance of 1667, tit. 22, art. 21.

proofs by witnesses, that we ought to consider their condition, their manners, their estate, their conduct, their integrity, their reputation: if their honor has received any blemish by a condemnation in a court of judicature: if they are in a condition to tell the truth without regard to the persons interested, or if it is to be feared that they are under some engagement, or have some inclination, to favor one of the parties, as if they are friends, or enemies, to one or other of them: if their poverty or wants expose them to the temptation of giving such testimony as may be agreeable to one of the parties, according as they have any thing to fear or hope for from him: if their testimony appears to be sincere, without affectation: if the depositions are conformable to one another, and not concerted: if the number of the witnesses, the conformity of their depositions, common fame, and the probability of the circumstances, confirm their evidence: if their variations, their disagreement, their contradictions, render them suspected: if the consequence of the facts be such as may require a more exact consideration of what may render the witnesses suspected, as in criminal prosecutions; or if the facts be so slight that it is not necessary to be so exact in the inquiry, as if the matter were only a bare action of slander or defamation, in a quarrel between persons of a mean condition. Thus, the right judgment that is to be made of the regard which ought to be had to the depositions of witnesses under all these views depends on the rules which have been explained, and on the prudence of the judges, to make a right application of them, according to the quality of the facts and the circumstances."

## XVI.

2054. *Witnesses against whom there lies no Exception may be mistaken.* — It is not ground enough, to be assured of the truth of the depositions of witnesses, that their integrity is well known; and therefore, seeing it may happen that the most intelligent and most sincere persons may have been deceived by others, or be themselves mistaken, either in the knowledge of the persons, or in some circumstances, or even in the facts, it is always prudent for the judge to consider well the depositions of all the witnesses, even of those who are most to be credited, and to see whether they agree with the other clear and certain proofs that may be had

of the truth of the facts and circumstances. And in order to give to the evidence its just effect, it is necessary to gather the truth out of all that appears to be certain in all the proofs together.\*

## XVII.

2055. *Witnesses may be compelled to give Evidence.*—The persons who are summoned to give evidence are obliged to come and declare what they know of the matter. For the consequence of discovering the truth of facts necessary for the administration of justice is what the public has an interest in. So that the judge may compel those who refuse to come and give their evidence, whether it be in civil matters, or in criminal.\*

## XVIII.

2056. *The Witnesses ought to be examined by the Judge.*—It is not enough, to give to the declaration of a witness the effect which it ought to have in justice, that the witness himself writes, or causes another to write, his evidence, and that he gives it or sends it to the judge; but it is necessary that he appear before the judge, and that the judge himself interrogate him, and put down his declaration in writing.\*

## XIX.

2057. *And ought to be first sworn.*—Seeing it is to the judge, and even to justice itself, that the witness gives his evidence, his declaration ought to be preceded by an oath that he will speak the truth; that the respect which he owes to religion may engage him to give his testimony with all the fidelity and all the exactness that justice and truth may require. And if he has no knowledge of the facts about which he is interrogated, he must even swear that those facts are unknown to him.\*

## XX.

2058. *Excuses of Witnesses.*—If the witnesses have excuses which hinder them from coming to give their evidence, they may

\* L. 13, in f. D. de testib.\*

\* L. 3, in f. D. de testib.; — l. 16, C. de testib. If the witness does not appear on the summons with which he is served, the judge condemns him in a fine, for which his goods may be attached and sold, and even his person may be imprisoned, in case he does not obey the summons. See the eighth article of the twenty-second title of the ordinance of 1667.

\* L. 3, § 3, D. de testib.; — d. l. 3, § 4.

\* L. 9, C. de testib.; — l. 16, cod. \* See the ninth article of the twenty-second title of the ordinance of 1667.



be discharged from coming. Thus, those persons whom sickness, or absence, or any lawful impediment, disables from appearing before the judge, their appearance is dispensed with.<sup>b</sup> But if their depositions be necessary, the judge may go himself, and examine them in person, or may give commission for that purpose to another, according as the quality of the fact may require and the laws and usage allow of it.

## XXI.

2059. *Witnesses who are excused by Reason of their Dignity.* — There are some persons whom their dignity exempts from appearing before the judge to give evidence; but in the cases where the testimony of such persons may be necessary, the judge must give proper directions therein, according to the different usages of places, or application must be made to the prince, if the quality of the fact and that of the witness may deserve it.<sup>c</sup>

## XXII.

2060. *Letters of Request for the Examination of a Witness who lives out of the Jurisdiction of the Court.* — If it happen in a civil cause that a witness has his abode without the jurisdiction of the judge who ought to take his deposition, and that by reason of the too great distance, or of the indisposition of the witness, or for other causes, he cannot be examined but in the place where he lives; the judge who has cognizance of the cause may, if it is necessary, request the judge of the place where the witness resides to examine the said witness, and may give him a commission for that effect. But in criminal prosecutions the witnesses can be examined only by the judge who takes cognizance of the crime.<sup>d</sup>

## XXIII.

2061. *The Advocate of the Party cannot be a Witness.* — Whoever have been employed as advocates in a cause cannot be wit-

<sup>b</sup> L. 8, *D. de testib.*; — l. 1, § 1, *D. cod.* See the following article.

<sup>c</sup> L. 16, *C. de testib.*; — l. 21, § 1, *D. de testib.*; — d. § 1, *in fine*; — l. 15, *D. de jurejur.* See the preceding article.

<sup>d</sup> Nov. 90, c. 5; — l. 18, *C. de jure instr.* The judge who takes cognizance of the cause requests the judge of the place where the witness lives to take his deposition, and gives him a power to do it by a commission for that end. V. Nov. 134, c. 5.

Besides the consequence that is taken notice of in the last text, when the matter relates to the proof of a crime, the necessity of confronting the witness with the criminal is another just motive why the witness ought to be examined by the judge before whom the trial is had.

nesses in it. For their testimony would be either suspected, if it were in favor of the person whose cause they had defended, or both uncivil and suspected, if it were against their client. And it is the same thing as to proctors and attorneys, and other persons who should happen to be under the same engagements.\*

## XXIV.

2062. *The Expenses of the Witnesses paid by the Party who summons them.* — The expenses which the witnesses are at for their journey, and for their attendance to give their testimony, are repaid them by the party at whose instance they have been cited; and that by virtue of an order of the judge, and according as he shall tax them.†

## XXV.

2063. *A False Witness is punished.* — If it happens that a witness can be convicted of having given false evidence, or of being guilty of some other misdemeanour, as if he has divulged the tenor of his deposition to the party accused, he may be punished for it according to the quality of the fact and the circumstances.‡

## SECTION IV.

## OF PRESUMPTIONS.

## ART. I.

2064. *Definition of Presumptions.* — Presumptions are consequences drawn from a fact that is known, to serve for the discovery of the truth of a fact that is uncertain, and which one seeks to prove. Thus, for example, in a civil concern, if there is a contest between the possessor of a land or tenement, and another who pretends to be proprietor thereof, it is a presumption that the said land or tenement belongs to the possessor; and he will be maintained in it if the other does not prove his right; for it is usual and natural that nobody takes possession of a thing without having a right to it, and that the proprietor does not patiently suffer

\* *L. ult. D. de testib.*† *L. 16, D. de testib.*‡ *L. 11, C. de testib.; — l. 16, in f. cod.*

himself to be turned out of his possession.<sup>a</sup> Thus, in a criminal affair, if a man has been killed, and it is not known by whom, and if it be discovered that he had a little while before a quarrel with another person, who had threatened to kill him, one draws from this known fact of the quarrel and threatening a presumption that he who had thus threatened him may have been the author of the murder.

## II.

2065. *Presumptions Strong or Weak.* — Presumptions are of two kinds: some of them are so strong, that they amount to a certainty, and are held as proofs even in criminal matters;<sup>b</sup> and others are only conjectures which leave some doubt.

## III.

2066. *The Foundation of Presumptions.* — The certainty or uncertainty of presumptions, and the effect which they may have to serve as proofs, depends on the certainty or uncertainty of the facts from which the presumptions are gathered, and on the justness of the consequences which are drawn from those facts, to prove the facts which are in dispute. And this depends on the connection that may be between the known facts and those which are to be proved. Thus, one draws consequences from causes to their effects, and from effects to their causes: thus, we conclude the truth of a thing by its connection with another to which it is joined: thus, when one thing is signified by another, we presume the truth of that which is signified, by the certainty of that which signifies it. And it is out of these different principles that signs, conjectures, and presumptions are formed. Concerning which there can be no certain rules laid down; but in every case it will depend on the prudence of the judge to discern whether the presumption be well or ill grounded, and what effect it may have to serve as a proof.<sup>c</sup>

<sup>a</sup> L. 2, C. de probat.; — l. 128, D. de reg. jur.; — l. 11, C. de petit. hered.; — l. ult. C. de rei vindic. See, concerning the presumption in favor of the possessor, that which is said of it in the preamble to the fourth section of Possession. See the fourth article of this section, and the thirteenth article of the first section of Possession.

<sup>b</sup> L. 19, C. de rei vindic.; — l. ult. C. de probat. See, at the end of the preamble to this title, the remark touching the edict of Henry II. of France, concerning women who have concealed their being with child.

<sup>c</sup> L. 2, § 2, D. de testib.

## IV.

2067. *Presumptions are either Concluding, or Uncertain.* — There are presumptions of such a nature, that what is presumed passes for truth, without any necessity of being corroborated by stronger proofs, if the contrary is not proved: and there are presumptions which have no other effect, if they are alone, than that they form a bare conjecture, and do not make that which is presumed to pass for truth. Thus, in the case of a possessor which has been mentioned in the first article, his possession makes it to be presumed that he is the true owner, and without other proofs he is accounted as such, and will be maintained in his possession until he who disturbs him therein establishes his right clearly. Thus, on the contrary, in the case of him who had threatened another with death, of which likewise mention has been made in the same article, the threatening which preceded the death of the person who was menaced makes against the person who threatened only a conjecture; and although he should not prove his innocence, if there were no other proof against him, this presumption would not be sufficient to convict him of being the author of the crime.<sup>d</sup>

## V.

2068. *Two Sorts of Presumptions.* — This difference between presumptions which have the effect of proofs, and those which leave some doubt, is the foundation of another distinction of two sorts of presumptions: one is of those which are authorized by the law, and which are appointed to be held as proofs; and the other is of those of which the law leaves the effect to the prudence of the judge, who ought to discern what may or may not suffice to give to a presumption the force of a proof. Thus, in the same case of a possessor, the law will have him to be held for the true owner, if it is not proved that he is not.<sup>e</sup> Thus, the laws ordain a thing that is adjudged to be held for truth.<sup>f</sup> Thus, they enact that he who is born of a married woman, and conceived during the time of wedlock, shall be reputed the son of the husband.<sup>g</sup> Thus, they have regulated that, if a married woman be found to have any goods or effects, and it is uncertain by what

<sup>d</sup> *L. ult. C. de probat.*; — l. 2, in *f. C. de in lit. jur.* See the preceding articles, and those which follow, as also the preamble of this title.

<sup>e</sup> See the first article.

<sup>f</sup> *L. 207, D. de reg. jur.*

<sup>g</sup> *L. 5, D. de in jus voc.*; — l. 6, *D. de his qui sui vel al. jur. sunt.*

title she has acquired them, they shall be accounted to be her husband's goods.<sup>a</sup> But, on the contrary, there is an infinite number of presumptions, which the laws leave doubtful, and which may be easily guessed at without any example.

## VI.

2069. *Proofs, without Witnesses and without Writing, by the Force of Presumptions.* — It follows from all the rules explained in the foregoing articles, that it often happens, not only in civil, but also in criminal matters, that certain proofs may be had without writing, and without witnesses, by the force of presumptions, when they are such that, upon certain and known facts, we may found necessary consequences of the truth of those which are to be proved.<sup>1</sup> Whether it be that we judge of causes by their effects, or of effects by their causes, or that we discover the truth by other principles. Thus, in the judgment of Solomon between the two women, it appears that he foresaw the commotions which would be produced in the heart of the mother by the fear of the death of the child; and knowing the cause by its effect, he judged of the one by the tenderness she expressed, which was the necessary effect of her maternal love, that she was the true mother of the child; and by the indifference and insensibility of the other, that the child was to her a stranger.

## VII.

2070. *Facts that are held as True, and Facts that must be proved.* — When the question is concerning the regard which ought to be had for presumptions, it is necessary to distinguish two sorts of facts. Some facts are such, that they are always reputed to be true, till the contrary has been proved; and there are others which are always reputed contrary to truth, unless they are proved. Thus, every thing that happens naturally and commonly is held for true; as, on the contrary, what is neither common nor natural will not pass for truth, if it is not proved. It is upon this principle that the presumptions are grounded, that a father loves his children; that every one takes care of his own concerns; that he who pays is indebted; that persons act according to their

<sup>a</sup> See the seventh article of the fourth section of *Dowries*.

<sup>1</sup> L. 3, § 2, *D. de testib.*; — l. 4, *D. de fide iurum.*; — l. 5, *cod.*; — l. 4, *C. de prob.*; l. 5, *C. fam. ercisc.* See the example of the edict of 1556, at the end of the preamble to this title.

principles and their custom; that every one usually governs himself by reason, and consequently acquits himself of his engagements and of his duty: and we ought never to judge without proof, nor presume that a father hates his children, that any person abandons his own interest, that a wise man has committed an action unworthy of his usual conduct, or that one has failed in any point of his duty. Thus, in general, all facts which are contrary to that which ought to happen naturally are never presumed, unless they be proved.<sup>1</sup>

## VIII.

2071. *It depends on the Prudence of the Judge to discern the Effect of Presumptions.* — It is by all these rules which have been just now explained, that we are to judge of the use and effect of presumptions; that we are to distinguish in every case the quality of the facts controverted, in order to judge which of them ought to be held as true, and which of them must be proved; and that we ought to distinguish those presumptions which ought to be held as proofs from those which ought not to have that effect. And it is on the prudence of the judge that the use and application of all these rules do depend, according to the quality of the facts and the circumstances,<sup>m</sup> as will appear by the examples explained in the articles which follow.

## IX.

2072. *Examples of a Fact which it is necessary to prove.* — If the relation between a person deceased, and him who pretends to be his heir at law or next of kin, were called in question, this relation would not be presumed without proof. For it depends on facts which are naturally unknown, if they are not proved. Thus, he whose relation is not acknowledged ought to prove it.<sup>n</sup>

<sup>1</sup> *Rego filia, bona tua quandoque distribuas liberis tuis, ut quisque de te mernerit sufficet, si non offenderint . . . . eos solos non admittit qui offenderunt.* L. 27, § 25, *D. de legat. 2.* It must be proved that they have failed in their duty.

Si bonus miles antea estimatus fuit, prope est ut affirmationi ejus credatur. L. 5, § 3, *D. de re milit.* Plernaque credendum est, eum qui partis dominus est, jure potius suo re uti, quam furti consilium inire. L. 51, *D. pro socio.*

Presumptionem pro eo esse qui accepit, nemo dubitat. Qui enim solvit, nunquam ita retupinus est ut facile suas pecunias jactet, et indebitas afundat. L. 25, *D. de probat.*

<sup>m</sup> L. 3, § 2, in *f. D. de testib.* See the third article.

<sup>n</sup> L. 1, *D. de probat.*

## X.

2073. *Example of a Presumption well grounded, that what has been paid was due.* — If any person, having made a payment to another, pretends that it is through mistake that he has paid a thing which was not due, and he who has received the payment maintains that what he has received was justly owing to him; it lies upon the person who has made the payment to prove that he has paid a thing that was not due. For it is presumed that he has not been so imprudent as to pay what he did not owe. But if the person to whom the payment was made denies it, and asserts that he has received nothing, and it should be proved that payment has been made to him, it would in that case lie upon him to prove that what he has received was justly owing to him. For his knavery in denying the payment would render him suspected of having received a thing that was not due to him.<sup>o</sup>

## XI.

2074. *Another Example of many Accounts between Two Persons.* — If two persons, having had many affairs together, have often made up their accounts of what they might be reciprocally indebted the one to the other, and one of them after the death of the other demands from the heirs or executors of the deceased a sum which he pretends to have advanced before all those accounts, and which he had never demanded, nor so much as taken any note or obligation for it, nor made any reservation thereof in his accounts; it will be presumed, either that this sum has never been due, or that it has been paid, or that the creditor has remitted it. For if he had really been, or pretended to have been, a creditor, he would have reckoned that sum in his accounts, as well as other debts; or he would have reserved it, and would not have put off the demanding it till after the death of the pretended debtor, who might have been able to show that he owed him nothing. And it would be the same thing if we suppose, instead of a sum of money, that the question is concerning any other sort of pretension, of which he had never made any demand or any reservation; unless it were some right of such a nature, and so well grounded, as that the circumstances should make it appear that those accounts, and the delay of making the demand till after the death of the debtor, ought to be of no prejudice thereto. Such as would be the warranty

against an eviction, the case whereof did not fall out till after making up all those accounts, or some other right of the like nature.\*

## XII.

2075. *Another Example, a Bond crossed or torn.* — If a promissory note or bond should chance to be found in the hands of the debtor, or if it had been crossed, rased, or torn in pieces, it would be a presumption that it had been acquitted or annulled, unless he who should pretend to make use of it had clear proofs that the debt was still owing, and that the said note or bond had been rased, crossed, or torn in pieces,<sup>a</sup> or had fallen into the hands of the debtor,<sup>b</sup> only by some violence, or some accident, or other event which would destroy the presumption that the debt was paid.

## XIII.

2076. *Example of a Presumption that proves nothing.* — If a tutor who had no estate of his own, or by his wife, before he entered upon the administration of his tutorship, is found to have enriched himself during the tutorship, the minor cannot for that pretend that those goods are his, or infer from thence that the tutor has been unfaithful in his administration, if otherwise he gives him in a true and just account. For it may happen that the tutor may have acquired those goods either by his labor and industry, or by other ways.\*

## XIV.

2077. *Example of a Presumption in an Ancient Fact.* —<sup>a</sup> When the question is to prove an ancient fact, of which there are no written proofs or living witnesses, if the fact be such that it ought to be admitted to proof; as, for instance, if the matter be to know how long an estate has been in a family, at what time a work was made, or other facts of the like nature; we receive the declarations which witnesses are able to make of what they have heard concerning the said facts from other persons who were then alive: and the proof which is drawn from those declarations is founded on this presumption, that, the persons whom the witnesses heard give an account of those facts, as notorious in their time,

\* L. 26, D. de probat.

<sup>a</sup> L. 24, D. de probat.

\* L. 15, C. de solut. et liberat.; — s. l. 1, C. de fide inst.

<sup>b</sup> L. 10, C. arbitr. tutel.



being dead before the proof of the facts was necessary, and nothing obliging them to say any thing but the truth, the account, therefore, which they had given of the said facts is presumed to be true.

## XV.

2078. *A Presumption of another Nature than those which serve for Proofs.* — All the rules which have been explained in the preceding articles concern facts which are such as that either the truth of them may be proved, or that, in default of proofs, one may know precisely by those rules what judgment to make of them. Thus, for example, we see by these principles that there are facts which pass for true, although there be no proof of them, if the contrary facts are not proved; that there are others which pass for false unless they are proved; that, among proofs and presumptions, some of them are certain, others uncertain; and that therefore, in these sorts of facts, reason may always determine itself to take one side, and to judge if we ought to hold a fact for doubtful or for certain, for false or for true. But there is another sort of facts, which are such that it is impossible to know the truth of the matter, and where, nevertheless, it is necessary to resolve on taking one of the opposite facts for true, although there be nothing but uncertainty both in the one and the other fact, and that it may likewise very readily fall out that we take the false for the true. Thus, for example, if a father and his son happen to be killed in a battle, or if both one and the other perish in the same shipwreck, so that there be no way to know if they both died at the same instant, or if one of them survived the other, and which of the two; and the widow of the father pretends that he died first, in order to make the father's inheritance to pass to the son, and so from the son to herself; the collateral relations, heirs to the father, pretending, on the contrary, that the father survived the son, or that they both died at the same instant of time, and that therefore, seeing the son could not succeed to the father, they succeed to him; this question cannot be decided without supposing either that the father died first, and that the son, having succeeded to him, has transmitted to his mother the estate of his father; or that the son died first, and has transmitted to his mother no part of his father's estate; or that they both died at the same instant of time,

<sup>1</sup> L. 2, 4 8, *D. de acquæ et ag. plu. arc.*; — l. 28, *D. de probat.*

and that the son, not having survived the father, did not succeed to him, and that therefore the inheritance of the father goes to his heirs. But seeing there is no way for determining which of these events is the true one, the law has directed that, in such a case, where it is necessary to take one side or other, and impossible to know the truth of the fact on which the decision depends, it shall be presumed that the father died first, and that, the son having succeeded to him, the mother reaps the inheritance of the father in that of the son." And this presumption is founded, on one part, on the inclination to favor the mother, and, on the other part, on the natural order; according to which the son ought to outlive his father. Thus, in this event, where it remains uncertain what nature has done, the law supposes that nature has done what it seems reason would have desired.

## XVI.

2079. *Another Kind of Presumption.* — There is yet another sort of presumptions, which do not relate to events or facts of which it may be necessary to know the truth, as in all the cases which have been mentioned in the preceding articles; but which regard the secret of the intention of persons, when it is necessary to know the said intention, and when there are no certain proofs of

" Cum bello pater cum filio perisset: materque filii, quasi postea mortui, bona vindicaret, agnati vero patris, quasi filius antea perisset: divus Hadrianus credidit patrem prius mortuum. L. 9, § 1, D. de reb. dub.

The question concerning the succession of this father and son is to be understood according to the written law of the Romans, or according to the right which the ordinances and customs give to mothers in the successions of their children.

Although it be natural to presume, in the case of this article and in others of the like nature, that the son survived his father, and that in general the children and descendants outlive their fathers and mothers and other ascendants; yet we find a contrary presumption in another law, where it is said, that, if it had been agreed between a father-in-law and son-in-law, that if the son-in-law should outlive his wife, and she leave behind her a child of a year old, the husband should have the wife's whole marriage portion; and that if, on the contrary, the child should chance to die before the mother, the husband should only retain a part of the said portion; and it had happened that the mother and child of a year old perished in a shipwreck, it would be probable that the child died first, and so the husband would have only that share of his wife's dowry which had been agreed on. Inter socerum et generum, convenit: ut, si filia mortua superstitem anniculum filium habuisset, dos ad virum pertineret: quod si vivente matre filius obiisset, vir dotis portionem, uxore in matrimonio defuncta, retineret. Mulier naufragio cum anniculo filio perit. Quid verisimile videbatur, ante matrem, infantem perisse: virum partem dotis retinere placuit. L. 26, D. de pact. dot. This presumption, that in this case the child died first, is founded on the weakness of its age, which makes it to be judged that the child was less able to resist, and that the mother lived some time longer than the child.

it. For, in that case, it is necessary to discover it by 'presumptions, if there be any such as may help us to find it out. . Thus, for example, if, in the case of two persons who bear the same name, one of them is instituted executor by a testator, when in the testament there was no certain description by which it could be known which of the two persons the testator meant to name for his executor, one would judge of the intention of this testator by the presumptions which might discover it; such as the ties of relation and friendship, which he might have only with one of the two; and by the other circumstances which might discover which of the two he intended to name for his executor.\*

## XVII.

2080. *Another Sort of Presumption.* — The use of the presumptions spoken of in the foregoing article respects the doubts, the obscurities, the uncertainties of the intention of persons, when it is not clearly enough explained. But there are some cases, in which the presumptions are extended beyond what has been in the thought of the person whose will we want to know. Thus, for example, if, a father having instituted his son, and the child of another son already deceased, his executors, and substituted the son to the grandson in case he should die before he arrived at a certain age, it should happen that this grandson, dying before he attained the said age, leaves behind him children; the question whether the substitution shall take place to the prejudice of the children of him who was charged with it will be decided by this presumption, that the testator did not mean to substitute, except in the case where his grandson should die without children, and that his intention could not be to call his son to the inheritance of his grandson who should leave children behind him.†

\* L. 62, § 1, *D. de hered. inst.* See the following article, and the remark on it.

† L. 102, *D. de condit. et demonstr.* It is to be remarked upon this and the preceding article, that the use of these sorts of presumptions for discovering or guessing at the intention of persons is very frequent in the interpretation of contracts and testaments, when it is necessary to interpret some ambiguity or some obscurity, and to judge of the intention of the persons who make covenants or testaments. And although this matter does not properly belong to this place, yet it is not altogether useless to distinguish here the several sorts of presumptions, that we may the better understand their nature and their different uses. But we ought not to set down here the rules of all these sorts of presumptions which may serve for the interpretation of covenants and testaments: for as to those which concern covenants, they have been explained in their proper places; and we shall explain in the matter of testaments the rules which have relation to them.

## SECTION V.

## OF THE INTERROGATION AND CONFESSION OF THE PARTIES.

2081. *Different Ways of having the Confession of a Party as to Facts.*— Seeing it often happens that he who has occasion to prove a fact that is contested has neither writing, nor witnesses, nor presumptions, that may be sufficient, one therefore in that case has recourse to draw from the mouth of the party a confession of the truth; and that is done three ways. One is, without the intervention of an oath, when one party summons the other by some act, and requires him to own the truth of a fact, whether it be the same that is in dispute, or some other that may serve to prove it; and this first way, which ought to be the only one, if everybody acted always honestly and sincerely, may have its effect, either when he who is summoned to declare the truth is sincere enough to own it, or when his want of sincerity engages him to make such answers as that one may draw from them some advantages against him.

2082. The second way of having the concession of a party is by interrogating him on facts that are pertinent; that is, which have relation to the dispute in hand. And this hath its use in the cases where he who wants to prove a fact, having no proofs thereof, and not being willing to refer it to the oath of his adversary, demands that he be interrogated by the judge upon facts which he draws up in the form of a libel, or allegation, dividing it into several articles, and inserting therein the fact in question, and other facts or circumstances which may have relation thereto, and serve to prove it. And if the judge finds that the said facts or circumstances, upon which it is desired that the party may be interrogated, may serve to prove the fact in question, he orders the party to be interrogated, and to make oath that he will speak the truth of all that he knows concerning every one of the articles; and the answers are taken down in writing; from which he who demanded them draws the consequences which may turn to his advantage, whether it be by the confessions, or denials, or variations of the party who has been interrogated.

2083. The third manner of having the confession of a party is when he who cannot have proofs of a fact which he alleges refers the matter to the oath of his adversary, and consents that the dec-

laration which he shall make, after having been sworn, shall be held for truth, and serve as a decision of the matter in dispute; and this is called a decisive oath. This last manner of the decisive oath shall be explained in the following section, and the others shall be the subject-matter of the present.

2084. We must not confound the decisive oath of a party, to which the matter in dispute has been referred, with the answers of those who are appointed to be interrogated upon facts alleged by their adverse party. For when the matter is referred to the oath of the party, the oath decides for the person who makes it; but the answers of the person who is interrogated upon facts do not decide in favor of him who answers, but serve only for drawing from his answers consequences which may help to prove the fact in question; and do not hinder the effect of other proofs that may be brought against him.

2085. There is likewise another kind of oath, which the judge ordains sometimes by virtue of his office, that is, of his own proper motion, even although it be not demanded by the party, nor the decision of the controversy referred to it; and it depends on the prudence of the judge to enjoin this oath in the cases where it may be proper. Thus, for example, if he who demands a sum of money having made good his demand, the defendant alleges that he has paid it, but does not prove the payment; the judge may, in condemning the defendant to make payment, require the plaintiff to swear that he has not already been paid. Thus, in the orders for admitting the claims of creditors, it is ordained that the creditors whose claims are allowed of shall make oath that the sums for which they are set down as creditors are lawfully owing to them. And this is done to hinder the collusion between creditors who have been already paid, and the debtor, who, that he might reap some profit thereby, should consent to their payment, to the prejudice of the lawful creditors; and likewise to prevent other frauds of creditors, who make a bad use of the difficulties which occur in the ranking of creditors, and in examining and stating all their claims.

#### ART. I.

2086. *The Confession of the Party serves for a Proof.* — If the party against whom one has occasion to prove a fact in a civil cause acknowledges himself that the fact is true, that acknowledgment will serve as a proof, and will be a sufficient ground for

the sentence of condemnation which ought to follow thereupon. And such a confession, if it is serious and positive, cannot be revoked, especially if it has been made judicially; \* unless there were in the said confession some error which might be rectified, as shall be shown in the following article.

## II.

2087. *A Confession through an Error in Fact.* — He who through error acknowledges a fact to be true which is not so, may rectify the said error by proving the truth which he was ignorant of.<sup>b</sup>

## III.

2088. *Confession through an Error in Law.* — If he who has owned the truth of a fact pretends to have owned it only by mistake, upon pretext that out of ignorance of the law he had made a confession contrary to his interest, he will not upon that pretence be allowed to revoke his confession.<sup>c</sup> Thus, for example, if a minor, having borrowed money, and being come of age, gets himself relieved from his obligation, but confesses that he employed the money to discharge a debt that was due from his father's inheritance, he will not be admitted to revoke the said declaration, by saying that he made it only through mistake, believing that by reason of his minority he would nevertheless be discharged from his obligation. For it was in point of law that he erred, and not in matter of fact; which does not alter the effect which his confession ought to have.

## IV.

2089. *Interrogation of the Party ordered by the Judge.* — When one of the parties demands that the other be interrogated upon facts which he deduces into articles, it depends on the prudence of the judge to order the party to be interrogated, if the facts are such that the knowledge thereof may be of service to decide the

\* L. 1, *D. de confess.*; — l. 56, *D. de re judic.*; — l. un. *C. de confess.* In capital crimes the confession of a criminal is not enough to condemn him, if there be no other proofs; because it might so fall out, that such a confession were only the effect of a trouble of mind, or of despair. V. l. 1, §§ 17 et 27, *D. de question.*

<sup>b</sup> L. 2, *D. de confess.*

<sup>c</sup> L. 2, *D. de confess.*

question that is to be determined; or not to order it, if the facts have no relation to the question in dispute.<sup>d</sup>

## V.

2090. *How the Party who is interrogated ought to answer.* — He whom the judge has directed to be interrogated is obliged to answer, and to declare clearly and precisely what he knows of the facts concerning which he is interrogated, without feigning or dissembling, and without ambiguity or obscurity; so as that he explain himself distinctly as to each particular fact, that his answers be sincere and natural, and that they quadrate exactly with the question that is put to him.\*

## VI.

2091. *Use of Interrogations.* — The use of these sorts of interrogations is not only to have thereby proof of the facts which the person who is interrogated shall own to be true; but although he should deny or conceal the truth, yet the interrogations may help to discover it by the consequences which may be drawn against him from all his answers. As if he denies facts which he knows, and which are certain; if he alleges any facts which are known to be false; if he varies and wavers in his answers; or if he owns facts from which one may infer the truth of those which he has denied.<sup>f</sup>

## VII.

2092. *The Answer which is made through an Error in Fact does no Harm.* — If it happens that he who has been interrogated discovers that, through mistake, he has owned some fact which was not true, or that he has been mistaken in the circumstances, and that, having found out the truth, he can make it appear that he was mistaken, his confession can be of no prejudice to the truth which shall otherwise appear.<sup>g</sup>

<sup>d</sup> L. 21, *D. de interrogat.* By the ordinances of France, it is lawful for each of the parties to demand that the other be examined upon interrogatories in all the steps of the cause, touching facts and articles that are relevant, that is to say, that may serve for the proof of the fact in question; and they are interrogated upon oath. See the ordinance of 1539, art. 37, and the following articles; the ordinance of 1563, art. 6, and that of 1667, tit. 10, art. 1. See the eighth article of the first section.

\* L. 11, § 7, *D. de interrog.*; — l. 14, § 1, *cod.* — l. 11, § 5, *cod.* See the ordinances quoted on the preceding article.

<sup>f</sup> L. 4, *D. de interrogat.*

<sup>g</sup> L. 11, § 4, *D. de interrog.*

## VIII.

2093. *Effect of Interrogations.* — If he who has been interrogated has owned the truth of the facts contested, or if it may be gathered from his answers, his interrogation will have the same effect as if he had consented to the sentence which condemns him to pay what is demanded of him, if the said condemnation be founded on the proofs which result from his answers.<sup>a</sup>

## IX.

2094. *They do not hinder the Effect of the other Proofs.* — The answers made by those, whom the judge has ordered to be interrogated upon facts alleged by their adverse parties, are not decisive in their favor, and what they answer does not serve as a proof for them, neither does it hinder the effect of the contrary proofs. But the effect which the said answers ought to have in discovering the truth of the facts in question depends on the prudence of the judge.<sup>1</sup>

## X.

2095. *Difference between these Interrogations and the Demand of a Sight of the Writings belonging to one of the Parties.* — We may place in the same rank with the confessions of parties that which may result from the deeds or writings which one party demands a sight of from the other, such as his journal, or other writing, if it be exhibited by the party of whom it is demanded. But there is this difference between a demand of the sight of the deeds and writings belonging to a party who does not exhibit them in court, and that of answers to interrogatories; that one may refuse to produce papers if he himself does not make use of them, but one cannot refuse to answer to facts that are pertinent. For the parties ought to know the truth of all the facts, whereof the knowledge is necessary for determining what is in dispute. And this knowledge ought to be common to all the persons who have an interest therein. But journals, and other papers which belong only to one party, are not common both to the one and the other. And these papers may chance to contain facts which ought to be kept secret, and which perhaps have no relation to the matter in dispute. Thus, one party cannot demand of the other to produce or communicate a writing of which the said party does not offer

<sup>a</sup> L. 11, § 9, *D. de interrog.*

<sup>1</sup> See the law cited on the sixth article.



to make any use himself; but it depends upon his own honesty and integrity to produce or keep up the writings whereof the sight is demanded. And one is obliged to produce only those writings on which he grounds his right. But if the refusal to produce any paper should give just ground to suspect some unfair dealing, as if a creditor who demands interest for a sum of money, or arrears of a rent, should refuse to produce his journal or day-book, in which the debtor pretends that the payment of what is demanded is marked down; it would depend on the prudence of the judge to give such orders, upon the said refusal, as the circumstances might require.<sup>1</sup>

## SECTION VI.

### OF AN OATH.

2096. *Divers Uses of an Oath.*—An oath is a security which the laws require on several occasions, either to corroborate an engagement, or to confirm an evidence or declaration touching the truth of a matter of fact; and this security consists in the confidence that one may have, that he who swears will not violate a duty, where he takes God to witness for his fidelity in what he declares, or in what he promises, and to be the judge and avenger of his infidelity, if he is guilty of perjury.<sup>a</sup> Thus, the laws require that persons who enter upon public offices shall make oath that they will execute them according to the rules prescribed to them. Thus, they oblige tutors, curators, and other administrators, to swear that they will faithfully perform the duties of their function. Thus, they appoint those who are called upon to bear witness in a court of justice, or to make a judicial report of things within their knowl-

<sup>1</sup> L. 1, § 3, *D. de edendo*; — l. 1, *C. eod.*; — l. 5, *C. eod.*; — l. 8, *eod.* What is said in this article concerning the production of papers respects only those papers which are in the hands of particular persons, and which are their own property, and has no relation to public notaries, registers, and other public persons and their heirs, or others who are depositaries of minutes and other writings which have been committed to their charge. For these sorts of persons, exercising a public function, are bound to produce the deeds or writings which have been deposited in their hands to the persons who are interested in them, even although it were against themselves; and if they refuse to produce them, they are compelled to do it by the judges. L. 2, *C. de edendo*; — l. 10, *D. eod.*; — l. 6, § 1, *eod.*

<sup>a</sup> Jerem. xlii. 5; xxix. 23.

edge, such as persons skilled in some art or profession, to swear that they will give a true testimony, or make a faithful report. Thus, when one of the parties, not being able to prove a fact which he advances, refers it to the oath of his adverse party, or the judge refers the matter to the oath of the party, he whose oath is desired, whether it be by the judge or by the adverse party, is bound to swear to what may be within his knowledge, and may serve to decide the matter in dispute.

2097. The use of an oath on these and all other occasions has been invented as a precaution against the inconstancy and infidelity of mankind, and to supply, by the firmness of so strict a tie of religion, the want of other assurances, which he whose oath is taken cannot give, or which it would not be just to require of him. Thus, one cannot have any other security from a witness that he will speak the truth, than what may be had from his oath that he will be sincere and upright in his declaration, and from the probability that he would not wilfully be guilty of perjury. Thus, it would neither be just nor decent to require of an officer of justice that he should give surety for his faithful discharge of his office, nor any other security besides that of his oath.

2098. An oath being a precaution that is easy to be taken, and it being a corroboration of the engagement of the person who swears, the use of an oath has been so far extended, that it has been made use of even in bare covenants between particular persons, the one swearing to the other that he would execute what he had promised; and we still see that, in obligations and in contracts, the notaries make mention of this oath. But seeing this was a superfluous precaution, and an occasion of perjury, this usage is abolished, and the parties contracting take no oath, although mention be made thereof in obligations and contracts. There is likewise another sort of oath, now gone into disuse, which the Roman laws required of all persons engaged in any lawsuit, obliging both plaintiffs and defendants, at the beginning of the cause, to swear that their demands and their defences were sincere and upright, without any intention to give unnecessary trouble, or to use quirks and cavils.<sup>b</sup> And this usually served to no other purpose than to be an occasion of perjury either to the one party or the other, or sometimes even to both. And although this oath had been re-

<sup>b</sup> L. 2, *Cod. de jur. prop. cal. dand.*

newed in France, by the ordinances, in some cases,<sup>c</sup> yet at present it is altogether disused, and no mention made of it.

2099. Of all the sorts of oaths which have been just now mentioned, we may imagine two uses, which make as it were two kinds of oaths. One is of the oath which is used to enforce and corroborate an engagement; and the other is of that which is taken by one of the parties in default of proofs, whether the oath be tendered by the adverse party or enjoined by the judge. Thus, the oath of public officers, of tutors, curators, and others, who are made to swear that they will faithfully discharge their functions, and that taken by witnesses, and by persons skilled in some art or profession, are in order to fortify and corroborate their engagements to discharge faithfully their offices and functions, to speak the truth, to make a faithful report: and all these oaths relate to future duties. But as to the oath which is tendered to one of the parties, although it ought to have, with regard to him who makes it, the effect of enforcing his engagement to speak the truth, yet it is under another view that it is considered as holding the place of a proof, which makes the fact to which he swears to be held for a truth. And it is under this view that this sort of oath is a matter which belongs to the subject of proofs, the rules whereof shall be explained in this section; whereas the other oaths do not make a matter which contains a detail of rules, but they are reduced to these few remarks which we have just now made on this subject.

#### ART. I.

2100. *Definition of an Oath, and its Use.* — An oath is an act of religion, by which he who swears calls upon God to be witness of his fidelity in what he promises, or to be judge and avenger of his infidelity, if he fails therein.<sup>a</sup> Thus, an officer makes oath that he will faithfully execute his office: thus, a witness promises and swears that he will speak the truth: thus, he to whose oath a matter in dispute is referred, that he may be judge in his own cause, promises to tell the truth so far as he knows of the matter.

<sup>c</sup> By an ordinance of *Philip the Fair*, in the year 1302, the king's proctors were obliged to take this oath in the causes which they commenced for the king's interest. And by the fifty-eighth article of the ordinance of *Orleans*, in all civil causes the parties were obliged to take this oath.

<sup>a</sup> *L. 2, C. de reb. cred. et jurej.*

## II.

2101. *The Oath is not taken unless it be directed.* — As a party is never made to swear in his own cause, except where there is a deficiency of proof, so nobody is admitted to swear, unless the oath be tendered to him, and directed by the judge, who is to inquire whether the proofs be sufficient, or if it be necessary to have recourse to the oath of the party.<sup>b</sup>

## III.

2102. *How a Matter is referred to the Oath of the Party.* — The party who finds that he has no proofs at all, or that he has not proofs sufficient, may refer the matter to the oath of his adversary; that is, submit to whatever he shall declare touching the matter, after he has been sworn. And this oath, which the judge directs and admits, if there be occasion, is often practised, and is useful for putting an end to lawsuits.<sup>c</sup>

## IV.

2103. *The Judge may order the Oath, without the Desire of the Party, if there be Occasion.* — Although the party who is destitute of proofs should not declare that he refers the matter to the oath of his adversary, yet the judge may order the oath to be taken, if he finds it reasonable. Thus, for instance, if a debtor from whom a creditor demands a sum of money due by an obligation, which he proves, alleges that he has paid it, but does not prove the payment, alleging only some circumstances which are not sufficient to discharge him from the demand, the judge may, in condemning the debtor to pay the debt, oblige the creditor to swear that he has not received payment of it.<sup>d</sup>

## V.

2104. *The Party's refusing to swear passes for a Proof.* — He, to whose oath his adverse party refers a matter of fact that is within his knowledge, is obliged to swear, if the judge requires it: and if he refuses to do it, the fact will be held as proved and confessed, in order to found the sentence of condemnation which ought to

<sup>b</sup> L. 3, D. de jurejurando. See in the following article the mode in which a matter in dispute is referred to the oath of the party, and how the oath is enjoined by the judge.

<sup>c</sup> L. 1, D. de jurejur. See the following article.

<sup>d</sup> Ex auctoritate judicis. See the law quoted on the preceding article. L. 3, C. de reb. cred. et jurejur.

follow thereupon. Thus, for example, if he who pretends to be creditor in a sum of money, for which he says that he either had no obligation at all, by reason of the smallness of the sum, or that it is lost, and he, not having sufficient proof of the debt, declares that he is willing to refer the matter to the oath of the person whom he calls his debtor, and who denies the debt, the debtor will be obliged to swear that he owes him nothing; and if he refuses to do it, the fact will be held to be true, and he will be condemned to pay the sum that was demanded.\*

## VI.

2105. *The Oath referred back again to the Person who first desired it of his adverse Party.*—If the fact which one party refers to the oath of the other be within the knowledge of both, he to whose oath the matter has been referred has the liberty either to swear, or to refer the matter back again to the oath of the person who desired his. And if he should refuse to do either the one or the other, the fact would be reputed as proved and confessed, and he would be condemned to what should be the consequence of the proof of the said fact.†

## VII.

2106. *He who has desired his Adversary's Oath may excuse him from Swearing.*—The person whose oath was desired being ready to swear, the party who desired it may excuse him from it. And in this case it will be the same thing as if the oath had been actually made.‡

## VIII.

2107. *He may likewise revoke his Consent to refer the Matter to his Adversary's Oath.*—He who has referred the matter to the oath of his adverse party may recall that consent, if his adversary has not as yet sworn. For it may happen, either that he has found new proofs, or that he has reason to fear a false oath.‡

## IX.

2108. *The Duty of the Judge in Relation to the Oath that is tendered by one of the Parties to the other, or referred back again to*

\* L. 34, § 6, D. de jurej.

† L. 34, § 7, D. de jurejur.; — l. 38, D. eod.; — l. 9, C. de reb. cred. et jurejur.

‡ L. 6, D. de jurejur.

‡ L. 6, in f. D. de jurejur.

*him who first tendered it.* — It follows from all the preceding rules, that, when the matter is concerning an oath, whether it be that one party tenders it to the other, or that he to whom it is tendered desires to refer it back again to his adversary, it depends on the prudence of the judge, according to the circumstances of the quality of the facts, and the knowledge which the person whose oath is desired may have of them, to direct it or not; and although the oath be not demanded by the party, yet the judge may enjoin it by virtue of his office, if there be occasion. And after the oath has been directed, if it has been at the desire of one of the parties the duty of the judge is to take the oath of the party who has been desired to give it, and to decree what ought to be adjudged in consequence of his oath, whether it be that he should have what he demands, or that he should be dismissed from the demand that is brought against him. But if he should refuse to swear, when he is made judge in his own cause, he will be either cast in his own demand, or condemned to pay what is demanded of him. And as to him who had referred the matter to his adversary's oath and to whose oath his adversary refers it back again, if he has just reasons for not swearing, as if the facts were not within his knowledge, he ought not to be constrained to swear. But if he refuses to make oath touching a fact that is within his knowledge it will be held as proved; and the judge will decree what shall be just according to the said fact. But if he swears, judgment will be given according to his oath.<sup>1</sup>

X.

• 2109. *The Oath decides the Controversy.* — When one of the parties has referred the matter to his adversary's oath, and he has sworn, his oath will be decisive; and what he shall have declared upon oath will be held for truth, and will serve as a rule. For it was to decide the controversy that his oath was desired. Thus it will have as much or more force than a thing that is adjudged and will have the same effect as a payment, if he of whom a sum of money was demanded swears that he owes nothing; or as a transaction, if it was a dispute of another nature.<sup>1</sup>

<sup>1</sup> L. 34, § 8, *D. de jurejur.*; — d. l. 34, § ult.

<sup>1</sup> L. 2, *D. de jurejur.*; — l. 5, § 2, *cod.*; — l. 56, *D. de re jud.*; — l. 27, *D. de jurejur.*; — l. 40, *cod.*

## XI.

2110. *The Oath extinguishes the Action.* — The decision of an oath puts an end to all other questions, except that of knowing what has been sworn. And it hath this effect, that it extinguishes the right of the party who referred it to his adversary's oath. For if it was the plaintiff, his demand is annulled, both in respect to himself, and also in respect to those who represent him. And if it was the defendant, he is debarred from making any defence, and the plaintiff's action remains established and proved, both against the defendant and against all those who succeed in his room. And it would be the same thing if the person whose oath had been desired by the contrary party, being ready to swear, had been excused from it, his adversary having 'dispensed with his swearing.<sup>m</sup>

## XII.

2111. *When a Writing is discovered after Oath has been made.* — If, after oath has been made, there be found writings which prove the contrary of what has been sworn; these new proofs will destroy the effect of the oath, and will reestablish the right of the other party. And this proof, which is readily received when the oath has been directed only by the judge, and not at the instance of the party, may also be received, although the oath have been made at the desire of the party himself, if the quality of the fact and the evidence of the proof make it reasonable that it should be so. As, for example, if he from whom a sum of money is demanded by virtue of a testament, of a contract, or of another title which is not produced and proved, acknowledges the truth of the title which happens to be lost or mislaid, but, being ignorant whether it makes mention of what is demanded of him, refers the matter to the oath of the plaintiff, and, having paid him, after he had made oath the title appears, and nothing is found in it which could oblige him to make payment of what is demanded, he may recover what he has paid upon account of this false oath.<sup>n</sup>

## XIII.

2112. *In what Matters this Oath of the Party is used.* — All that has been said of an oath in the foregoing articles is to be

<sup>m</sup> L. 7, in f. D. de jurejur.; — l. 9, § 1, D. eod.

<sup>n</sup> L. 31, D. de jurejur.; — l. 1, C. de reb. cred. et jurejur.; — l. ult. C. eod.; — d. l. in f.

understood of all the cases which may happen in all civil matters, when the facts and the circumstances may render the use of an oath just and decent. But in crimes, the accuser cannot put the party accused upon his oath, nor can the accused oblige the accuser to swear, neither can the judge refer the matter to the oath of either of them. For it would be contrary to justice and to good manners, that the acquittal or condemnation of the party accused should depend on an oath, which interest or passion might influence contrary to truth, or that it should depend on any other cause besides that of a full proof of the truth.

#### XIV.

2113. *Effect of the Oath with Respect to Persons interested with the Parties.* — If in a cause decided by the oath of the party, he who has sworn, or he who has referred the matter to his adversary's oath, be interested with others for the whole debt, so as that any one of them alone may discharge the whole, or be compelled to pay the whole debt; although one of them only has been in judgment, yet the oath will have its effect with respect to them all, either for or against them.<sup>p</sup>

#### XV.

2114. *The Oath neither benefits nor hurts Third Persons.* — The decision made by the oath of the party respects only the parties between whom the oath has been ordained, or those whose right is in their hands, or their sureties, and the persons who represent them; but it cannot hurt third persons. Thus, for example, he to whose oath the matter had been referred, in a demand of a thing which he pretended did belong to him, and who had sworn that it was his, could not plead this oath against another person who should claim a right to the same thing.<sup>a</sup>

#### XVI.

2115. *What Persons may refer the Matter in Dispute to the Oath of the Party for others.* — It is only the persons interested who can refer the matter in dispute to the oath of the party, and those who have a right to do it in the name of others, whether it be by

<sup>o</sup> L. 3, § 1, *D. de jurejur.*

<sup>p</sup> L. 28, *D. de jurejur.*; — d. l. 28, § 3. See the following article.

<sup>a</sup> L. 3, § 3, *in fine, D. de jurejur.*; — l. 9, § ult. et l. 10, *cod.* • See, touching sureties, the fifth article of the fifth section of the title of *Sureties*.



the authority of law, as a tutor or guardian; or by the will of the party concerned, as a proxy. But the tutor and proxy cannot refer the matter to the oath of the party, unless they observe the rules which have been explained in their proper place.<sup>r</sup>

## TITLE VII.

### OF POSSESSION AND PRESCRIPTION.

2116. *Why Possession and Prescription are here joined together.* — We have joined together under the same title the matter of possession and that of prescriptions, because it is by possession that prescription is acquired; so that one is as it were the cause, and the other the effect: and likewise for this reason, that both the one and the other are ways of acquiring and ascertaining the property of things. For it will appear in this title, that not only is the property of a thing acquired by prescription, which is in effect nothing else but a possession continued for a long time, but that it is likewise sometimes acquired by the bare effect of possession, without prescription.

2117. *Use of Possession, and the Differences between Property, Possession, and Detention.* — The use of possession is such, that without it the property would be useless. For it is only by the means of possession that we have the things in our power, that we make use of them, and that we enjoy them; which is the reason why the word *possession* is often used to signify property,<sup>a</sup> although they be two things which are necessary to be distinguished, they being so different that one may have one of them without the other<sup>b</sup>. Thus, for instance, if one sells to another thing belonging to a third person, and delivers it to him, the purchaser, who comes by it fairly and honestly, having the thing in his custody, and being considered as master of it, he has the possession thereof, but not the property, until he has acquired the same by a long possession: and this third person retains his property

<sup>r</sup> See the fifth article of the second section of *Tutors*, and the tenth article of the third section of *Proxies*. See the eighth article of the first section *Of that which is done to defraud Creditors*.

<sup>a</sup> L. 78, D. de verb. signif.

<sup>b</sup> L. 12, § 1, D. de hęc. vel am. poss.

without possession, until he brings his action against the purchaser for the recovery of it.

2118. It appears by this example, that, seeing possession and property may be separated, they are two different things, which ought not to be confounded together. But although it may seem by this distinction, that possession is nothing else but a detention of that which one has in his custody, whether he have the property of it or not; yet we must not take for a true possession all sorts of detention, but only that of a person who detains a thing as being master of it; whether it be that he himself has the actual detention of the thing, it being in his own custody, or that he exercises his right by the intervention of other persons to whom he commits the custody of it, such as a depositary, a tenant, a farmer; for in that case he possesses the thing by the hands of those persons who hold it in his name. So that whereas there is properly speaking only one true possession, which is that of the master, we may distinguish three sorts of detention, according to three different causes which it may have: that of the master, when he has in his own custody the thing that belongs to him; that of the persons who hold it for the master; and that of usurpers, who detain it without any right or title.

2119. *Three Causes of Detention.* — The first of these causes of the detention of a thing is the right of property, which gives to the proprietor the right to have in his custody what is his own, that he may use it, enjoy it, and dispose of it: and it is to this first cause that the detention is naturally linked.

2120. The second cause of detention is the will of the owner of the thing, which makes it to pass into the hands of another person; as if it is a house which he lets, lands which he farms out, or gives to be enjoyed by a creditor for a certain time, in satisfaction of his debt; if it is a movable which he lends, or lets out, which he deposits, or gives in pawn. In all these cases the detention passes into other hands than the master's, but without depriving him of his possession. For he retaining always his right of property, which implies the right to possess, and the detention being in the hands of other persons only in his name, it is he who possesses by the others, and they have only a borrowed possession for some time, and which can never acquire to them the right of property. And as he who appoints a factor or agent to sell, to give, or transact, does himself sell, give, and transact, according as the said factor or agent does it in his name; so the proprietor.

whose possession passes by his consent into the hands of another person possesses by the said person.<sup>c</sup>

2121. The third cause of detention is usurpation, whether it be by stealth, or by robbery, or by some other unlawful way. And this manner of detention does not deserve the name of possession.<sup>d</sup> Thus, it is by the cause of the detention that we are to judge whether it is a possession, or only a usurpation. And when it is a possession, we must distinguish if it is in the hands of the master to whom it naturally belongs, or if he possesses by the hands of another.

2122. *We must distinguish, in Possession, that which is of Right from that which is of Fact.* — It follows from these remarks, that it is necessary to distinguish, in the general idea which is formed from the word possession, a right and a fact; the right to possess, and the actual detention, which is a fact. It is from thence that arise, and it is by that that we must explain, the different ways of speaking which we see in the laws, — That possession has nothing in common with property: *Nihil commune habet proprietas cum possessione.* L. 12, § 1, *D. de acq. vel am. poss.* That the possession cannot be separated from the property: *Proprietas a possessione separari non potest.* L. 8, *C. de acq. et ret. poss.* That possession is a thing of fact, and not of right: *Res facti, non juris.* L. 1, § 3, *D. de acq. vel am. poss.* That possession is not only a thing of fact, but that it is likewise a matter of right: *Possessio non tantum corporis, sed et juris est.* L. 49, § 1, *eod.* That the usufructuary has a kind of natural possession: *Naturaliter videtur possidere is qui usumfructum habet.* L. 12, *D. de acq. vel am. poss.* That the usufructuary is not a possessor: *Eum qui tantum usumfructum habet, possessorem non esse.* L. 15, § 1, *D. qui satisd. cogantur.* That he does not possess: *Non possidet, sed habet jus utendi, fructu.* § 4, *Inst. per quas pers. nobis acq.*; L. 1, § 8, *D. quoc' legat.* From all which it is necessary to conclude, that the true possession is, properly speaking, only that of the master; and that although others besides the master may have a right to detain the thing, such as the tenant, the farmer, the usufructuary, who, having a right to enjoy, ought by consequence to have the detention of the thing; which in them is only a borrowed possession, or rather the master's own possession, who possesses through them; because the

<sup>c</sup> See the eighth and ninth articles of the first section.

<sup>d</sup> L. 23, § 2, *D. de acq. vel amit. poss.*

right of possession cannot be separated from the property. This is not contrary to what has been said, that he who fairly and honestly purchases lands, or any other thing, from one who was not the owner of them, possesses them although he has not the property; for this purchaser is considered as proprietor, and therefore is looked upon as possessor. And although the master may be deprived of the actual detention, by the detention of a usurper, yet he always preserves his right to take possession, whenever he is able to remove the usurpation: and the unjust detention of the usurper has only the appearance of a possession, although he has in effect hold of the thing, and enjoys it; because the vice of this detention gives it another nature than that of the true possession, which ought to be founded on a just title.

2123. It is because of this difference between the true possession of the master, and all other detention, that we distinguish two sorts of possession, which are expressed by the words of *civil possession*, and *natural possession*,<sup>e</sup> or otherwise by the words of *legal possession*, and of *corporeal or actual possession*.<sup>f</sup> The civil or legal possession is that of the master; and the natural or corporeal possession is that of the persons who have only the bare detention of the thing, such as the usufructuary, the farmer, and others. This possession is called natural or corporeal, because it consists only in the bare natural detention, without the right of property; and the other is called civil or legal, because it is joined to the right which the law gives to possess as master, whether he has likewise the natural detention of the thing in his own hands, or whether he possesses it by the hands of another.

2124. *Divers Meanings of the Word "Possession."* — It is necessary to remark on all these different expressions of the laws, some of which appear to be inconsistent with one another, that it seems as if divers meanings might be given to these words of possession, and of civil and natural possession, and as if we might understand these texts differently under different views, according to the said different meanings, either giving to all manner of detention the name of possession, even to that of a usurper, or giving it only to that of the master. But it is of no great importance whether we qualify these several sorts of detention with the name of possession, or whether we distinguish them by peculiar words; provided that in confounding together the words *possession* and *deten-*

<sup>e</sup> L. 2, § 1, D. *pro hærede*.

<sup>f</sup> L. 10, C. *de acq. et ret. possess.*

tion, we do not confound the divers effects of these different manners of having a thing in one's power; and that we distinguish the causes of the detention, and the differences between the possession of the master and that of a usurper, between these two detentions and that of persons who have a thing in their hands, but do not claim the property of it; and that we distinguish, likewise, among the persons last mentioned, between those who have some right to the thing, as a usufructuary or a farmer, and those who have no right to it, such as a depositary, and he who has found a thing lost, of which he knows the right owner. For according to these differences we must distinguish the rules which relate to all these persons. Thus, for example, whatever name we give to the detention of a usufructuary, and whether we consider him as possessing only in the name of the master, or as having himself a kind of possession or detention for his usufruct, we must know that he has nevertheless a right to defend himself in his enjoyment of the fruits, since he might maintain himself therein, even against the proprietor himself, in case he should offer to turn him out of possession.<sup>a</sup> And it would be the same thing with respect to a farmer and a tenant;<sup>b</sup> for they have all of them a right to enjoy, which cannot have its effect without an actual detention of the thing which they have a right to enjoy. So that we may say, that, as they partake of the right which the master has to enjoy, they partake also of his right to possess, and that they have a kind of possession proportioned to the use which their right demands.

2125. *Connection between Possession and Property.* — We may judge by all these remarks of the idea which we ought to conceive of the nature of possession, and what connection it has with the right of property; and that as we cannot exercise fully all rights of property, if we are not in actual possession of the thing, so likewise we have not a complete possession of a thing, unless we have the property of it also.

2126. It is because of this connection between possession and property, and because it is natural for the proprietor to possess what belongs to him, that possession and property are acquired and preserved, the one by the other. Thus, whoever has acquired the full property, whether it be by sale, by donation, by legacy, or by other titles, he has a right to take possession. Thus, he who

<sup>a</sup> See the first article of the first section of *Usufruct*.

<sup>b</sup> See the sixth article of the sixth section of *Letting and Hiring*.

possesses. honestly and fairly acquires the property, if he had it not before, provided his possession lasts during the time that is regulated for prescription; and the property is likewise acquired by the bare possession, without prescription, in certain cases, as has been already remarked, and as will further appear in the second section.

## SECTION I.

### • OF THE NATURE OF POSSESSION.

#### ART. I.

2127. *Definition of Possession.* — Possession, taken in a proper sense, is the detention of a thing, which he who is master of it, or who has reason to believe that he is so, has in his own keeping, or in that of another person by whom he possesses.<sup>a</sup>

#### II.

2128. *Connection between Possession and Property.* — Seeing the use of property is to have a thing in order to enjoy it and to dispose of it, and that it is only by possession that one can exercise this right; possession therefore is naturally linked to the property, and ought not to be separated from it. Thus, possession implies a right and a fact; the right to enjoy annexed to the right of property, and the fact of the real detention of the thing, that it be in the hands of the master, or of another for him.<sup>b</sup>

#### III.

2129. *There are not Two Possessions of one and the same Thing.* — As it is not possible, when two persons contend for the property of one and the same thing, that each of them alone can have the right of property; so neither is it possible, when two persons dispute about the possession of one and the same thing, for every one of them alone to have the possession. But as there is only

<sup>a</sup> L. 1, *D. de acq. vel am. poss.* This definition results from what has been said in the preamble, and from the second, sixth, eighth, ninth, and eleventh articles of this section. See the twelfth article of the second section.

<sup>b</sup> L. 8, *C. de acquir. et retin. possess.*; — d. 1, § 3, *D. de acq. vel amitt. poss.*; — l. 49, *cod.*; — d. l. 49, § 1. See the thirteenth article of this section, the first article of the third section, and the third and fourth articles of the second section.

one who is the true owner, so likewise there is only one true possessor.<sup>c</sup> And if it happens that the possessor is another person than the right owner, his possession will be only a usurpation, and he will be obliged to relinquish it, and to deliver it up to the owner.

## IV.

2130. *What Things may be possessed.* — One may possess corporeal things, whether they be movables or immovables;<sup>d</sup> but according to the differences of their nature, the marks of the possession of them are different. Thus, one may possess movables, by keeping them under lock and key, or having them otherwise at one's disposal: thus, one possesses cattle, either by shutting them up, or giving them to be kept: thus, one possesses a house by dwelling in it, or having the keys thereof, or trusting it to a tenant; or by building in it: thus, one possesses lands by cultivating them, reaping the fruits, going and coming through them, and disposing thereof at pleasure.<sup>e</sup>

## V.

2131. *A Kind of Possession of Right.* — There is likewise a kind of possession of things which consist only in rights, such as a right of jurisdiction, a right which a lord of a manor may have to oblige his vassals and tenants to grind in his mills, and bake in his ovens, and to pay him a fee for the use of them, a toll, an office, and other sorts of goods which one possesses by the use and exercise which he makes of his right as occasion offers. And it is this exercise which makes the possession of such things, as well as of a service, which is likewise a right of another nature, which one possesses by the use he makes of it, although he does not possess the lands or houses from which the service is due. Thus, he who has a right of passage through the ground of his neighbour possesses that service by going through the said ground which he does not possess.<sup>f</sup>

<sup>c</sup> L. 3, § 5, *D. de acq. vel amitt. possess.*; — l. 5, § ult. *D. commed.*; — l. 19, *D. de precar.*; — v. l. 5, *D. uti possidetis.* See the ninth and tenth articles of this section.

<sup>d</sup> L. 3, *D. de acq. vel amitt. possess.*

<sup>e</sup> L. 74, *D. de contr. empt.*; — l. 3, § 13, *D. de acq. vel amitt. possess.* See the sixth article of this section touching the *Possession of Immovables.* See the seventeenth article of the second section.

<sup>f</sup> L. ult. *D. de servitut.*

## VI.

2132. *Possession does not require a Continual Detention.* — Although possession implies the detention of what we possess, yet this detention ought not to be so understood as if it were necessary to have always either in our hand, or in our sight, the things of which we have the possession. But after the possession has been once acquired, it is preserved without an actual detention,<sup>a</sup> as shall be explained in the second section.<sup>b</sup>

## VII.

2133. *Possession of Living Creatures.* — As we may possess living creatures, which it is not possible to have always in our power and custody; so we retain the possession of them whilst we shut them up, whilst we have them under the care of a keeper, or if, being made tame, they return home without a keeper, as bees to their hives, and pigeons to their dove-houses. But the creatures which escape out of our custody, and do not come back, are no longer in our possession, till we recover them again.<sup>b</sup>

## VIII.

2134. *The bare Detention, without some Right in the Thing, is not a true Possession.* — The bare detention of a thing is not properly called possession: and it is not enough for possession, that we have actual hold of a thing, and have it in our custody; but we must have it, together with the right to enjoy it and to dispose of it, as being masters of it, or as having just cause to believe ourselves to be the right owners.<sup>1</sup> For he who detains a thing without having this right, if he detains it against the will of the owner, is not a possessor, but a usurper: or if it is with the owner's good will, this detention leaves to the owner his possession, and it is he who possesses.<sup>1</sup>

## IX.

2135. *One may possess by others.* — One may possess a thing, not only by one's self, but also by other persons. • Thus, the pro-

<sup>a</sup> L. 4, C. de acquir. et reij.

<sup>b</sup> L. 3, § 2, D. de acq. rer. — l. 3, § 15, D. de acq. vel amitt. poss.; — d. l. 3, § 16; — d. l. 3, § 23.

<sup>1</sup> L. 22, § 1, D. de nozal. act.; — l. 21, C. de furt.; — l. 49, § 1, D. de acq. vel amitt. poss. See the second article.

<sup>1</sup> L. 17, § 1, D. de pos. See the following article, and the eleventh article of the fifth section.



prietor of a house, or other tenement, possesses by his tenant, or by his farmer. Thus, the debtor who has given a pawn to his creditor, he who has deposited or lent a thing, or given it to be enjoyed by another, possess by those to whom they have given the thing in keeping. Thus, the minor possesses by his guardian. Thus, one possesses by a factor, or agent; and, in general, every proprietor possesses by the persons who hold the thing in his name.<sup>m</sup>

## X.

2136. *Precarious Possession.*—Those who possess precariously, that is, by having prayed the master to let them have the possession, do not deprive him thereof; but possessing by his consent, they possess for him. Thus, for instance, if the seller of a house, or of lands, does not deliver the same at the time of the contract, and he keeps possession thereof, whether it be to reap the fruits which he had reserved to himself for a certain time, or that he might have time to evacuate the places, and to deliver them free from all encumbrances, or for other causes; it is mentioned in the contract, that he shall possess only precariously; which hath this effect, that the purchaser is considered as possessing by the hands of the seller. And if we consider both the one and the other as having the possession, that of the purchaser who is master is distinguished by his right, and by his intention of possessing as master, and that of the seller consists only in a bare detention, without the right of property, and is not a true possession.<sup>n</sup>

## XI.

2137. *Possession is either Honest or Knaveish.*—There are two sorts of possessors, those who possess honestly and fairly, and those who possess knaveishly.<sup>o</sup> The honest and fair possessor is he who is truly master of the thing which he possesses, or who

<sup>m</sup> L. 1, § 7, *D. de itin. act. pr.*;—l. 1, *C. comm. de usuc.*;—l. 1, § 20, *D. de acq. vel amitt. possess.*;—l. 2, *cod.* See the preamble to this title.

<sup>n</sup> Is qui rogavit, at precario in fundo moretur, non possidet: sed possessio apud eum qui concessit, remanet. L. 6, § 2, *D. de precar.*

Eum qui precario rogavit, ut sibi possidere liceat, non habet possessionem non est dubium. An is quoque possidet, qui rogatus sit, dubitatum est. Placet autem, penes utrumque esse eum hominem, qui precario datus esset: penes eum qui rogasset, quia possederat corpore: penes dominum, quia non discesserat animo possessione. L. 15, § 4, *cod.*

We have added the last words of this article, in order to reconcile the apparent contradiction that exists between these two texts.

<sup>o</sup> L. 3, § 22, *D. de acq. vel amitt. possess.*

has just cause to believe that he is so, although it may happen in effect that he is not; as it happens to him who buys a thing which he thinks belongs to the person whom he buys it of, and yet belongs to another. The knavish possessor is he who possesses as master, but who assumes this quality when he knows very well, either that he has no title at all to it, or that his title thereto is vicious and defective. We shall see the effects of these two sorts of possession in the third section.

## XII.

2138. *A Clandestine or Surreptitious Possession.*—We must reckon in the number of knavish possessors, not only usurpers, but also those who, foreseeing that the right which they pretend to have will be disputed, and fearing lest they should be hindered from taking possession thereof, take some opportunity of getting into possession surreptitiously, without the knowledge of the person from whom they expect the opposition.<sup>p</sup>

## XIII.

2139. *The Possessor is presumed to be the right Owner.*—Although the possession be naturally linked with the proper and ought not to be separated from it, yet we found them, so as to believe that the one cannot be without the other.<sup>q</sup> For it often happens that, the property of a thing being controverted between two persons, there is only one of the two who is owned to be possessor, and it may be that it is the person who is not the right owner, and that thus the possession may be separated from the property. But even in this case, the natural connection which exists between the possession and the property makes the law to presume that they are joined in the person of the possessor; and until it be proved that the possessor is not the right owner, the law will have him by the bare effect of his possession to be considered as such. For seeing it is the owner who ought to possess, it is natural to presume that he who is in possession is also the right owner, and that the right owner has not suffered himself to be turned out of possession.<sup>r</sup>

<sup>p</sup> L. 6, D. de acq. vel amitt. poss.; — l. ult. in f. D. de ritu nupt.; — v. l. 10, si serv. vind.

<sup>q</sup> See the second article.

<sup>r</sup> L. 52, D. de acq. vel amitt. poss.; — l. 12, § 1, eod.; — l. 1, § 2, D. uti possid.

<sup>s</sup> See the first article of the fourth section of the title of Proof.

## XIV.

2140. *Detention which the Owner cannot take away.*—The possession, or the right which a master has to possess, is often separated from the actual detention, and the master may have no right to take away the thing from him who has it in his keeping. Thus, for instance, if he who sells an estate reserves to himself the enjoyment of it for some years, he will keep the possession, and cannot be turned out of it, although he is not any longer master of it. Thus, he who has the use and profits of an estate holds and possesses it, and the proprietor cannot molest him in his possession. Thus, the debtor cannot take away from his creditor that which he has given him in pawn. But in these cases, the detention not being a consequence of the right of having a thing to one's self, and of disposing of it, it is not a true possession, in the sense of the definition explained in the first article, which may entitle one to exercise all the rights of possession when it is joined with the property; but it is only a right to hold the thing for the use thereof, which may have been granted to those persons who have the actual detention of it.<sup>4</sup>

## XV.

2141. *The Possessor is maintained in his Possession without a Title, if no Title be produced against him.*—It follows from the rule explained in the thirteenth article, that all possessors ought to be maintained in their possession and enjoyment of the thing until they who trouble them in their possession prove clearly their right. And if a demand of the property against the possessor is not grounded upon good and sufficient titles, it is enough for the possessor to allege his possession, without producing any other defences.<sup>5</sup>

<sup>4</sup> L. 5, § 1, *D. ad exhib.*; — l. 1, § 8, *D. de acq. vel amit. poss.*; — § 4, *Inst. per quas pers. cuq. acq.* See the twenty-third article of the third section of *Pawns and Mortgages*. — L. 5, § 1, *D. si usuf. pet.* See the first article of the fifth section of *Usufruct*.

<sup>5</sup> L. 128, *D. de reg. jur.* See the first article of the fourth section of the title of *Proofs*. This rule which maintains the possessor in his possession, even without a title against him who disturbs him, ought not to be extended to matters relating to church benefices, in which lawsuits are so very frequent, about the possession of the benefices. For there is this difference between the possession of church benefices and that of temporal goods which enter into commerce; that whereas in these all possessors are maintained in their possession without any title, if they who disturb them therein produce no title on their part, the possessor of a church benefice is not maintained therein, if, together with his possession, he have not a capacity for the function, and a good title to the benefice. Which difference is founded upon this, that whereas all sorts of persons are capable of

## XVI.

2142. *If Two Persons pretend to be Possessors, he who has been in Possession for the Space of a Year is preferred.* — Seeing the possession is in some cases sufficient of itself to maintain the possessor therein, it often happens that the two parties who claim the property of one and the same estate pretend likewise that they are in possession of it, and that each of them on his part, in order to be maintained in the possession, endeavours to make it appear that he is possessor; and that they reciprocally molest one another by acts which may show them to be in possession. And in these cases, if it appears that one of the two has been in peaceable possession for the space of a year, before the disturbance given him by the other, he will be maintained therein.\*

## XVII.

2143. *The Question about the Possession is judged before that of the Property.* — The controversies whereof the matter in dispute is to regulate between two persons, who pretend to be possessors of one and the same thing, which of the two shall be maintained in the possession, ought to be instructed and decided without examining into the right of property. For the discussion of the titles necessary for deciding the right of property often demands delays, which the dispute about the possession cannot admit of. And seeing it is of importance not to leave two possessors exposed to the danger of the consequences of such a dispute, the matter touching the possession is regulated in the first place, and it is only after that the same is fully ended that inquiry is made into the right of property.† Thus, he who is declared to be possessor

possessing the things which are in commerce, and that the ways of acquiring them are indefinite, ecclesiastical benefices cannot be possessed but by persons who have a capacity proportioned to the quality of the function, and who are inducted therein by the ways which the laws of the church have established for that purpose. So that the right of possession in church benefices is judged, not by the bare possession, but according to the clearest titles. *De Prebend. c. eum qui lib. 6; — de Reg. Jur. c. 1, tit. 6.* See the ordinances of 1453, art. 75; 1493, art. 58; 1535, chap. 9, art. 6; 1667, tit. 15, art. 2 and 6.

\* L. 1, § 2, *D. de itin. actuoq. priv.*; — d. l. § 3; — l. 2, *C. unde vi.*

† L. 35, *D. de acq. vel amitt. poss.*; — l. 3, *C. de interdictis.* By the ordinances of France, one cannot commence his action for the property till the question about the possession has been decided, and he who shall have been condemned has fully satisfied the sentence, by restoring the fruits and paying the costs and damages, if any have been awarded; and the parties are not suffered to join these two demands of the possession and property together in one and the same action. See the ordinance of 1607, tit 18, art. 4 and 5. See the following article

has the advantage of retaining the possession whilst the property remains undetermined.<sup>a</sup>

## XVIII.

2144. *The Demand of the Possession ought to be made within the Year.* — He who pretends to have been interrupted in his possession ought to make his demand or complaint thereof within the year, to be reckoned from the day of his being turned out of possession.<sup>a</sup> For if he leaves his adversary in possession for the space of a year, he has lost his own possession, whatever apparent right he may have had to it. But he retains his action for the property.

## XIX.

2145. *If the Possession be doubtful, Judgment is given according to the Titles, or the Thing is sequestered.* — If the question touching the possession be doubtful, so that there does not appear ground enough to maintain any one of the possessors therein, the possession will be adjudged in favor of the person who shall have the most probable title; or the judge will order the thing in controversy to be sequestered, until the question relating to the property, or that of the possession, shall be decided.<sup>b</sup>

## SECTION II.

OF THE CONNECTION BETWEEN POSSESSION AND PROPERTY, AND HOW ONE MAY ACQUIRE OR LOSE THE POSSESSION.

### ART. I.

2146. *The Right to possess is acquired with the Property.* — Seeing possession is naturally linked with the right of property, and ought not to be separated from it,<sup>a</sup> whoever has acquired the

<sup>a</sup> L. 24, *D. de rei vindic.*

<sup>b</sup> L. 3, *C. unde vi*; — l. 1, in *f. D. de interdict.* By the ordinances of France, the action for the possession ought to be begun within the year after the disturbance. See the ordinance of 1539, art. 61, and that of 1667, title 18, art. 4 and 5.

<sup>c</sup> This is a consequence of the preceding rules. See the ordinances of 1453, art. 74; of 1555, chap. 9, art. 3; of 1667, art. 86; of 1667, tit. 15, art. 10, tit. 19.

See the fourth section of the title of *Depôt*, L. 9, § 3, *D. de dolo*; — l. 39, *D. de acqu. rel. amitt. poss.*; — l. 21, § 3, *D. de appell.*; — l. 5, *Cod. quor. appel.*

<sup>d</sup> See the second article of the first section.

property of a thing either acquires at the same time the possession thereof, or has a right to get it, and to recover it if he had lost it.<sup>b</sup> Thus, there are as many different causes of possession as there are different titles of property.<sup>c</sup>

## II.

2147. *Difference between acquiring the Right to possess, and acquiring the actual Possession.*—We must not confound the ways of acquiring the right to possess, of which mention has been made in the foregoing article, with the ways of entering and getting into possession, and of having a thing in one's power to use it, to enjoy it, and to dispose of it. The ways of acquiring the property of things, and by means of the property the right to possess them, are infinite. For one acquires them by a sale, by exchange, by donation, and by other different titles which the laws have regulated. But there is only the effectual detention which puts us into the real and actual possession of what is ours. And this detention is acquired in the manner that shall be explained in the sixteenth article, and the other articles which follow.<sup>d</sup>

## III.

2148. *In some Cases the Property may be acquired by the bare Effect of Possession.*—The connection between the possession and the property has not only this first effect, that the property implies and gives the right to possess; but it has also this second effect, that the possession gives often the property. Thus, whoever acquires the possession of a thing, of which he may likewise have the property, and which belongs to nobody, himself becomes master of it by the bare effect of the possession. For, by having in his power that which nobody has a right to take from him, he becomes at one and the same time both possessor and proprietor thereof. And this happens in several cases, which shall be explained in the fifth and other following articles.

<sup>b</sup> L. 52, D. de acq. rer. dom.

<sup>c</sup> L. 3, § 21, D. de acq. vel amitt. posses.

<sup>d</sup> Quarundum rerum dominium nanciscimur jure gentium quod ratione naturali inter omnes homines peræque custoditur: quarundam jure civili; id est, jure proprio civitatis nostræ. L. 1, D. de acq. rer. dom.; — § 11, Inst. de rer. divis. As to the distinction between the law of nations and the civil law, of which mention is made in this text, see what has been said thereof in the *Treatise of Laws*, chap. 11, no. 1, 4, 32, 33, 39, and following numbers.

<sup>e</sup> § 12, Inst. de rer. divis.; — l. 3, D. de acq. rer. dom.

## IV.

2149. *In these Cases the Possession is a Title for the Property.*

— All the manners of acquiring the property by the possession are so many ways which make a part of those which nature and the laws give to mankind, for applying to their use the several things whereof the possession is necessary in order to have the use of them. For there are things which one uses without possessing them, and which indeed cannot be possessed, whether it be because of their nature, or because the use of them is as yet common to all persons; and there are others of which we cannot have the use without possessing them. Thus, we have the use of the air, the light, the sea, rivers, highways, and many other things, without possessing them; and we cannot use without possession that which is necessary for food and raiment, and for an infinite number of other different uses. And it is this possession which is acquired, either by the titles which convey the property, or without any other title besides the events which put the things into our hands, and which make them ours, as if it were by a deliverance of them to us by the divine providence which orders and directs those events.<sup>f</sup>

## V.

2150. *One acquires by Possession what no other Person has Right to.*— It is natural, according to the principles which have been remarked in the preceding articles, that the things which God has created for the use of particular persons, and which have not as yet passed into the possession of any body, should belong to those who are the first who discover and make use of them. Thus, when mankind began to increase and multiply, those who entered first into the lands which were not inhabited, and took possession of them, became justly masters of them.<sup>g</sup>

## VI.

2151. *As if one finds Precious Stones and other Things of Value.*— Those who discover, or who find without design, precious stones, and other things of great value, in places where it is lawful for them to search for them, and to take them, become masters of them.<sup>h</sup>

<sup>f</sup> § 1, *Inst. de rer. divis.*; — L. 2, § 1, *ead.* See the first, second, and third articles of the first section of the title of *Things*.

<sup>g</sup> L. 3, *D. de acq. rer. dom.*

<sup>h</sup> *Lapilli, et gemmæ et cætera quæ in littore maris inveniuntur, jure naturali æquæ in-*

VII.

2152. *Property is acquired by Hunting and Fishing.* — Wild beasts, fowls, fishes, and every thing that is taken, either in hunting, fowling, or fishing, by those who have a right thereto, belongs to them as their property, by virtue of the seizure which they make of them.<sup>1</sup>

VIII.

2153. *By Captures from the Enemy.* — We acquire, likewise, by capture and by the right of war, that which we take from the enemy.<sup>1</sup>

IX.

2154. *If one finds a Thing that is relinquished, or thrown away with Intention to give it to whosoever can catch it.* — He who finds a thing that is abandoned, that is, of which he who was master of it quits and relinquishes the possession and property, not being willing to keep it any longer, becomes master of it;<sup>2</sup> in the same manner as if it had never belonged to any body. And it is with much greater reason that those who gather up pieces of money, or other things, which princes or other persons throw among the multitude, out of magnificence, on some extraordinary occasions, acquire what falls into their hands. For besides the possession of a thing, which he who was master of it is not willing to keep any longer, they have his intention, which makes over the things to those who catch them.<sup>3</sup>

ventoris sunt. § 18, *Inst. de rer. divis.*; — l. 3, *D. eod.* We have not put down this article in the general terms of an indefinite liberty to all persons to acquire the property of these kinds of things, by discovering or finding them. For according to our usage, the precious matters which are the produce of mines, for example, do not belong entirely to those who discover them, even in their own lands; but the king has a right to a share of them, which is regulated by the ordinances. See the fifth article of the second section of the title of *Things*.

<sup>1</sup> § 12, *Inst. de rer. divis.*; — l. 1, § 1, *D. de acq. rer. dom.* It is to be remarked on this article, that the liberty of hunting, fowling, and fishing is not permitted to all persons, in all places indifferently. See the eleventh article of the first section of the title of *Things*, and the remark on the first article of the same title.

<sup>2</sup> § 17, *Inst. de rer. divis.* • It is also to be observed on this article, that the spoil and booty taken from the enemy do not always belong indifferently and entirely to those who make the capture. For the admiral, for instance, has a right to a share of the prizes that are taken at sea.

<sup>3</sup> L. 1, *D. pro derelicto*; — § 47, *Inst. de rer. divis.* See the third, twenty-eighth, and twenty-ninth articles.

<sup>4</sup> L. 9, § 7, *D. de acq. rer. dom.*; — § 46, *Inst. de rer. divis.*; — Nov. 105, c. 2, § 1.



## X.

2155. *Or a Thing that was lost, the Owner whereof cannot be found.* — If he who has found a thing that was lost, having done all that was possible to find out the true owner, that he might restore it to him, cannot learn who he is, he remains master of it, till he who was the owner appears and proves his right.<sup>o</sup>

## XI.

2156. *Or a Treasure.* — Although treasures be not of the number of things which are lost or relinquished, or which never belonged to any body, yet they who find them acquire the possession and property of them on the terms regulated by the laws. We call that a treasure which hath been hid in some place that it might not be found, and of which the proprietor, or his heirs, or others having his right, do not appear; which has the same effect as if nobody had any right to them.<sup>p</sup> But if they should appear, it would be a theft not to restore the treasure to them.<sup>q</sup>

## XII.

2157. *What Nature adds to a Ground belongs to the Master of the Ground.* — The proprietors of lands acquire the possession of that which nature adds to them, and which augments the land, and is as it were an accession to it. Thus the insensible accretion which may happen to a ground bordering on a river, by the effect of the water, accrues to the master of the said ground. But if an inundation, or the change of the channel of a river, separates one part of a ground, and joins it to a neighbouring ground, the property of the said part will belong still to its first master. For, whereas what is added to a ground by an imperceptible accretion cannot be distinguished in order to be restored to another master, and may perhaps come from some other place than the neighbouring ground, one may distinguish in those sudden changes that which belongs to every one. Thus, all these sorts of accretions

<sup>o</sup> If the owner cannot be found, it is the same thing as if the thing belonged to nobody. See the third article. See the first article of the first section, and the first and second articles of the second section of *Engagements which are formed by Accidents*.

<sup>p</sup> L. 31, § 1, *D. de acq. rer. dom.*; — l. 3, § penult. *D. de jur. fisci*; — l. un. *C. de thesaur.*; — § 39, *Inst. de rer. divis.*; — l. 7, § 12, *D. sol. matr.*; — v. *Nov. Leon. 51*.

<sup>q</sup> *D. l. 31, § 1, D. de acq. rer. dom.*; — v. l. 57, *D. de rei vind. et l. 15, D. ad exhibendum*. Our usage as to treasures is different from the Roman law. But seeing this matter does not come within the design of this book, and that it is of a large extent, we shall not explain it here.

augment the ground only in so much as does not appear to remain still to its first master.\*

## XIII.

2158. *The Possession of the Building is acquired to the Master of the Ground.*—Buildings belong to those who are masters of the ground on which they are built. For the edifice is an accession which is added to the ground, and which cannot take away the ground from the proprietor. Thus, when one person builds on the ground of another, the building is acquired to the master of the ground. And when one builds on his own ground with materials that are not his own, he becomes master of them; for, seeing the materials cannot be separated from the ground but by demolishing the building, which it is for the public good not to suffer, the possession of the building belongs to the master of the ground, and by virtue of that possession the property, with the charge of paying the value of the materials. But if there was put into this building any thing of great value, which it would be just to separate from it, such as a statue, or other ornament, it would be restored to the person who was master of it. For the right of hindering the separation of the materials is limited to what is necessary for the building, and which, being a part thereof, cannot be easily separated from it. But if he who had made use of materials which were not his own had done it knavishly, he would be liable to costs and damages, and to other penalties, which the quality of the act might deserve.\*

## XIV.

2159. *It is the same Thing in Respect of what is planted.*—It is the same thing with respect to what is planted in a ground as it is with buildings; and if it happens that the master of a ground has planted in it trees which were not his own, or that the owner of the trees has planted them in the ground of another person, and that they have taken root in it, they will belong to the master of the ground; but he will be obliged to pay the price of the trees, and be liable to costs and damages, and other penalties, if

\* L. 7, § 1 et 2; D. de acq. rer. dom.;—l. 1, C. de alluvion. See the sixth article of the first section of Engagements which are formed by Accidents.

208 L. 7, § 10; D. de acq. rer. dom.;—d. R. § 12.

21 L. 7, § 13; D. de acq. rer. dom.;—l. 5, § 3, D. de rei vindic.;—l. 11, C. ad

there be ground for it, according to the rule explained in the foregoing article.

## XV.

2160. *Possession of what is added to a Movable.* — The same reason which makes the proprietor of a ground to be master of what is built or planted in it, holds likewise with respect to movable things, and makes that which becomes inseparable from the movable to become the possession and property of him who is master of the movable. Thus, a piece which is part of a movable that is made up of several pieces put together is acquired to him who owns the movable, he paying the price which that piece might have been worth by itself. For what cannot be separated from the whole belongs to him who is master of the rest. But if what is added be of greater value than the movable, such as a picture upon a canvas, the value and dignity of the most precious thing will draw to it the other which is of less value;<sup>a</sup> and the painter will be master of the picture, he paying the price of the canvas. And it would be the same thing, if of a matter of little value there had been made a precious work, such as a statue of marble or brass, or a precious composition made of several matters of small value. For, in all these cases, although there had been nothing added to the said materials, besides the art which made the work out of them, he who gives being to a thing ought to be master of it;<sup>b</sup> unless the workmanship were of less value than the matter, such as the engraving of seals on precious stones. Thus, in order to judge to whom the things ought to belong after these sorts of changes, it is necessary to consider the circumstances of the quality of the work, of that of the matter, of the causes for which the work has been made, if it was for the use of the person who made it, or of the master of the matter, or

<sup>a</sup> L. 23, § 2, *D. de rei vindic.*; — l. 9, § 1, *D. de acq. rer. dom.*; — d. l. 2; — l. 23, § 4, *D. de rei vindic.* We have not put down in this article the example of writing upon paper; for the text cited on this article ought to be understood either of some other matter more precious than our paper, or of writing which would not deserve that the matter upon which it is written should be taken away from the master, as that which was written in table-books made of wax in order to be blotted out. But as to writing on our paper, it is most certain that the master of the paper would not become master of what should be written on it, although it were only a bare letter: and much less if it were writings or deeds of any consequence.

<sup>b</sup> L. 3, § 21, *D. de acq. vel amitt. poss.* See another case, where a thing is composed of a mixture of diverse matters which did belong to several persons, in the seventh article of the first section of *Engagements formed by Accidents.*

...ne other person who had bespoke it. And by all these views, and others of the like nature, one may determine who ought to have the thing; and likewise regulate what he who keeps the thing is to give, either for the matter or for the workmanship.

## XVI.

2161. *In what Possession consists.* — All that has been said in the preceding articles relates to the causes which may give us the possession, or the right to possess: and we are now to consider how one becomes possessor, and the ways of entering upon a real and actual possession. Seeing the use of possession is to exercise the right of property, it implies three things: a just cause of possessing as master, the intention to possess in this quality, and detention. This intention is not understood of that of a usurper, or of a knavish possessor, who has the intention to possess as master, but of him who is in reality master, or who possesses so as to have just reason to believe that he is master. The detention is understood, not only of him who has the thing in his own hands, or in his power, but likewise of him who holds it by the intervention of other persons, such as a depositary, a tenant, a farmer. Without the intention there is no possession. Thus, the possessor of a ground, in which there is a treasure unknown to him, does not possess the treasure, although he possesses the place in which it is. Without the detention the intention is useless, and does not make the possession. Thus, he whose thing has been stolen does not possess it any longer. And without a just cause the detention is only a usurpation.

## XVII.

2162. *Possession which one takes of his own Accord, without a preceding Right.* — The possession of the things which we acquire by their falling into our hands, such as that which we find, and which has no master, that which we take in hunting, and those things which we have a right to take from the owners, as the spoil of an enemy, is acquired by the bare fact of our laying our hands upon them.

See the eighth article of the first section. *L. 3, § 1, D. de acq. vel amitt. possess.;* — *d. l. 3, § 3;* — *l. 4, C. de acq. et retin. poss.;* — *l. 8, D. eod.;* — *l. 3, § ult. D. ad exhibend.;* — *l. 3, § 13, D. de acq. vel amitt. poss.* We have explained in the preamble the difference between the natural possession and that which the laws call civil. *L. 2, § 3, eod.;* — *v. l. 30, eod.* See the first article of the first section. See the twenty-third article.

§ 13. *Inst. de rer. div.;* — § 12, *Inst. eod.* See the third article of this section.

## XVIII.

2163. *Possession which is only taken by Delivery of the Thing.* — The possession of things, which one acquires from other persons who have them in their custody, does not pass to the purchaser but by the delivery which is made of them to him by the seller, donor, or other person from whom he purchases them. And if the said person should refuse to deliver them, the purchaser cannot take possession of the thing by force, but ought to have recourse to a court of justice for obtaining it.\*

## XIX.

2164. *In what consists the Delivery which gives Possession.* — The delivery that is necessary for putting into possession the person who purchases a thing of another, consists in that which makes it to pass out of the power of the one into that of the other. Thus, movables may be delivered from hand to hand, or one may transport them from one place to another, and put them into the possession of him who becomes master of them.<sup>b</sup>

## XX.

2165. *Delivery and taking of Possession.* — The delivery and the taking possession of movables does not always require that they should be removed from one place to another; but it is sufficient for putting them into the possession of the new master, either to leave them in his hands, if he had them already, as if a depositary should buy what was deposited with him; or, if they are kept in a place under lock and key, to deliver to him the key. But if they are neither kept under lock and key, nor easy to be transported, such as materials for a building, one takes possession thereof by a bare view of them, and by the intention of him who parts with them, and of him who becomes master of them. And there is also a kind of tacit delivery, which is made by the bare will of the contracting parties, as among those who join their goods in partnership. For, from the moment of their agreement, each of them begins to possess by the others the goods which they are willing to have in common.<sup>c</sup>

\* L. 20, C. de pact.; — l. 9, § 3, D. de acq. rer. dom.; — l. 5, D. de acq. vel acquit. possess. See the seventh article of the third section.

<sup>b</sup> See the following article, and the fifth and sixth articles of the second section of the Contract of Sale.

<sup>c</sup> L. 1, § 21, D. de acq. vel acquit. possess.; — l. 5, § 6, D. de acq. rer. dom.; — l. 9, § 5, D. eod.; — l. 44, Inst. de rer. divis.; — l. 3, § 13, D. de acq. vel acquit. possess.; — l. 61,

## XXI.

2166. *Delivery and taking Possession of Immovables.*—As to immovables, those who alienate them, either by sale or by other titles, strip themselves of the possession by declaring only either that they will not possess any longer, or that, if they still hold the land or tenement, it shall be only precariously, or by delivering the keys, if it is a place that is locked up. And the possession passes to the new master by the bare effect of the intention to possess, joined to some act which denotes his right, as if he goes in person to the land or tenement to take possession of it as master, although he do not go over all the parts of it. And one may likewise take possession of a land or tenement by a bare view thereof.<sup>a</sup>

## XXII.

2167. *Delivery and taking Possession of Things which consist in Rights.*—The delivery of that which consists in rights, such as a jurisdiction, a right which the lord of a manor has to oblige all his vassals and tenants to make use of his mills and ovens, an office, a service, a rent, and other goods of this nature, is made by giving up the titles, if there are any; and if there be no titles, by the bare effect of the purchase, together with the common intention of the contractors that the purchaser should put himself into possession. And one takes possession by acts which may have that effect. Thus, one takes possession of a jurisdiction by naming officers to exercise it, receiving the fines and confiscations, and by exercising the other rights which depend thereon. Thus, one takes possession of an office by taking the rank and place which it entitles one to, and by exercising some function thereof. Thus, one takes possession of a service by using it for the purpose for which it was intended, and of a rent which one has acquired, or of another right, by giving notice of the assignment, or of the title of the purchase, to the debtor, and by the enjoyment thereof.<sup>b</sup>

end;—l. 1, § 1; et l. 2, *D. pro socio*. See the sixth article of the second section of the *Contract of Sale*.

<sup>a</sup> See the seventh article of the second section of the *Contract of Sale*. *L. 3, § 1, D. de acq. vel amit. possess.*;—l. 18, § 1, *D. eod.* According to the usage in France, instruments of seizin, or taking possession, are drawn up by public notaries, in order to make proof thereof. Which serves to mark the time from which prescription begins to run, as well against those who should pretend to be proprietors, as against persons who have other rights which are to last only a certain time, such as a power of redemption belonging to the kindred of a family, or reserved by the contract of sale.

<sup>b</sup> See the fifth article of the first section of this title, and the ninth article of the second section of the *Contract of Sale*.

## XXIII.

2168. *One can possess only a Thing which is certain and determined.* — Whatever may be the nature of the thing which one ought to have the possession of, whether it be movable or immovable, or some right, one can never possess but a thing which is certain and determined; that is, such as one may know precisely what has been possessed. Thus, one may possess either an entire field, or a distinct part of the said field, as such a particular acre, or even an undivided portion thereof, as a fourth part or a moiety, enjoying the fruits thereof in proportion. But one cannot possess an uncertain portion of a ground or field, as if one had purchased a portion not yet determined which one had in a ground, such as should appear to belong to him, his right not being as yet adjusted. For possession implying the detention of the thing, one cannot possess, no more than he can hold indefinitely, an uncertain thing, which one does not know what it consists in.<sup>f</sup>

## XXIV.

2169. *How the Possession is preserved.* — The possession being once acquired, the possessor retains it afterwards, by the bare effect of his intention to keep it, joined to the right and liberty of using the thing when he pleases; whether he puts in execution the said liberty by making use of the thing, or whether he lets it alone without touching it. Thus, one possesses not only the lands which he cultivates, and of which he gathers the fruits, but also those which he lets lie uncultivated, and which he never goes near,<sup>g</sup> provided only that he do not suffer the possession of them to be usurped by other persons.

## XXV.

2170. *One retains the Possession by other Persons.* — The proprietor preserves likewise his possession by the hands of other persons who possess in his name, such as a farmer, a depository, he who has borrowed a thing, the creditor who has it in pawn, the usufructuary, and other persons who hold the things by titles of the like nature.<sup>h</sup>

<sup>f</sup> L. 3, § 2, D. de acquir. vel amitt. possess.; — l. 26, eod. See the sixteenth article.

<sup>g</sup> L. 4, C. de acq. et ret. poss.

<sup>h</sup> L. 9, D. de acq. vel am. poss. See the eighth, ninth, and tenth articles of the first section.



XXVI

2171. *One may take Possession either himself, or by other Persons.*— One may take possession of a thing either himself, or by a factor or agent. And he who gives it away may likewise deliver it either himself, or by his agent. And minors acquire the possession by their guardians, as the guardians may also deliver the goods of minors which are alienated.<sup>1</sup>

XXVII

2172. *The Possessor succeeds to the Right of his Author.*— He who enters into the possession of a thing which he acquires from another succeeds to the same right, and possesses neither more nor less than his author did possess. Thus, he who purchases lands, and is put into possession of them, will possess, in the same manner as the seller did, the services which may be due to the said lands, and will be subject to the services which they may owe.<sup>1</sup>

XXVIII

2173. *One loses the Possession of what one alienates or relinquishes.*— As possession is acquired by the intention to possess, joined with the actual detention of the thing, it is likewise lost by the intention of not possessing any longer, the owner putting out of his hands and out of his power that which he did possess; whether it be that he alienates it to another, or relinquishes it, he parting therewith with intention never to have it any more. And the bare intention not to possess any longer is of itself sufficient to deprive one of the possession, as it happens to the seller whom the buyer entreats to keep for some time the thing that is sold; for it is not any longer the seller who possesses it, but the buyer who possesses through him.<sup>2</sup>

XXIX

2174. *Things that are lost, and those which are thrown into the Sea in a Danger of Shipwreck, are not relinquished.*— We must not reckon in the number of things relinquished those which one

<sup>1</sup> L. 1, § 2, D. de acq. vel amitt. poss.; — d. l. 1, § 20, — l. 20, § 2, D. de acq. rer. dom.; — l. 13, eod.; — d. l. § 1.

<sup>2</sup> L. 20, D. de acq. rer. dom.

<sup>3</sup> L. 153, D. de reg. jur.; — l. 3, D. de acq. vel amitt. poss.; — l. 3, § 6, eod.; — § 47, Inst. de rer. divis.



has lost, or that which is thrown into the sea in a danger of shipwreck to save the vessel, or those which are lost in a shipwreck. For although the owners of those things lose the possession of them, yet they retain the property, and the right to recover them. Thus, those who find things of this kind cannot make themselves masters of them; but are obliged to restore them, pursuant to the rules explained in their place.<sup>a</sup>

## XXX.

2175. *One loses his Possession by the Possession of another Person.* — Possession is likewise lost when another comes to possess, and has been in possession for the space of a year. For a year's possession even in the person of a usurper, if it has been peaceable and unmolested, makes him to be considered as a just possessor, and even as master, until the true owner makes out his right in order to recover his possession.<sup>b</sup>

## SECTION III.

## OF THE EFFECTS OF POSSESSION.

## ART. I.

2176. *The First Effect of Possession is the Enjoyment.* — The most natural effect of possession is to put the property in use, and to give to the proprietor the actual exercise of his right, by enjoying the thing, and disposing of it. And it is for the sake of this use, that the possession is naturally linked to the property.<sup>a</sup>

## II.

2177. *Another Effect is to acquire in certain Cases the Property at the same Time that one enters upon Possession.* — This is also another effect of possession, that, in many cases explained in the foregoing section, it gives the property. And it is even by possession that men naturally began to acquire the dominion of things.<sup>b</sup>

<sup>a</sup> L. 44, D. de acq. rer. dom.; — l. 21, § 1, D. de acq. vel amitt. poss.; — d. l. § 2. See the first article of the first section, and the first article of the second section of *Engagements which are formed by Accidents.*

<sup>b</sup> L. 2, C. unde vi. See the eighteenth article of the first section.

<sup>c</sup> L. 8, C. de acq. et ret. poss. See the second article of the first section.

<sup>d</sup> L. 1, § 1, D. de acq. vel amitt. poss.; — § 18, Inst. de rer. divis. See the first article of the second section.

Thus, possession is in one sense the cause of property; and, on the contrary, it is the effect of it in another sense, in the cases where one acquires the property before he can enter into possession; as if one buys a thing which is not delivered at the time of the purchase. For, in this case, the property gives the right to have the possession.

## III.

2178. *Another Effect, to acquire the Property by a long Possession.*— Possession hath likewise this effect, that if, in the time that one acquires it, the property is not joined therewith, it follows the possession, not in the same instant that one enters into possession, as in the case mentioned in the preceding article; but by a possession that is continued during the time regulated for prescribing. Thus, he who buys a thing which he believes the seller to be owner of, and which yet belongs to another, does not become master of it in the moment that it is delivered to him by the seller; but if he continues to possess it during the time limited for prescription, he will become master of it, even although the person of whom he bought it had possessed it knavishly.\*

## IV.

2179. *Another Effect is to make the Possessor be considered as Master.*— This is likewise another effect of possession, that the possessor is considered as master of the thing, although it may happen that he is not so.<sup>d</sup>

## V.

2180. *Effect of a Fair and Honest Possession.*— The possession of him who possesses with a good conscience has this effect, that, while he is ignorant of any better right to the thing than his own, he enjoys and makes his own the fruits which he gathers, and not only those which he reaps from the ground by his own industry, but likewise those which the ground produces without culture. For, as has been remarked in another place, his sincere and upright belief of his own right is to him instead of truth, and makes him look upon himself, and be looked upon by others, as right owner of the thing, whilst his upright belief is not interrupted by

\* *Inst. de usucap. et long. temp. prerog.*; — v. l. 36, *D. de usu et usufr. leg.*; — § 7, *Inst. de usucap. et long. temp. prerog.*

<sup>d</sup> See the first article of the fourth section of *Proofs*.

any demand. And if it happens that the thing is evicted from him, he shall restore no part of what he enjoyed before the demand.\* But he will be obliged to restore the fruits which he reaped after the demand. For he ought to have acquiesced in the demand, seeing it was just, as appears by the event, of the eviction; and after the demand he could not pretend any longer to be ignorant of the right of the true owner, which ignorance was the cause of his honesty and integrity.<sup>†</sup>

## VI.

2181. *Effect of a Knavish Possession.* — The possession of him who possesses knavishly has this effect, that it hinders him from prescribing,<sup>‡</sup> and obliges him to restore, not only the fruits which he has enjoyed, but likewise those which a careful husband might have reaped from the land or tenement which he was in possession of.<sup>§</sup>

## VII.

2182. *Possession by Force.* — All that has been said of possession in this and the preceding sections ought not to be understood of the possession of usurpers, and of knavish possessors, who know they possess what they have no right to. For not only are they not considered as possessors, but they are punished according to the quality of their attempt. And it is the same thing with respect to those who, being commanded by a court of justice to quit their possession, although it may have been just in its beginning, do not obey the sentence.<sup>¶</sup> And they are turned out of possession with all the force that their resistance may make necessary, and undergo the penalties which their disobedience may deserve. But this force cannot be employed except by authority of justice, which allows of no other force except what is in her own hands.<sup>||</sup>

\* L. 48, D. de acq. rer. dom.; — l. 25, § 1, D. de usur.; — l. 136, D. de reg. jur.

† See the fifth and sixth articles of the third section of *Interest, Costs, and Damages*. See the ninth and tenth articles of the same section, touching the cases where the honest and upright possessor restores the fruits gathered before the demand.

‡ § 3, Inst. de usucap. et long. temp. præscript.; — l. 3, § 3, D. de acq. vel am. poss.

§ See the thirteenth article of *Interest, Costs, and Damages*.

¶ L. 1, § 2, D. de vi et de vi arm.; — l. 68, D. de rei vindic.

## SECTION IV.

OF THE NATURE AND USE OF PRESCRIPTION, AND OF THE MANNER  
IN WHICH IT IS ACQUIRED.

2183. *The Nature and Use of Prescriptions.*— Nobody is ignorant of this advantage, among others, of prescriptions, that they ascertain to possessors the property of estates, after a possession that has lasted during the time regulated by law. But although prescriptions seem naturally to be necessary for this use, yet they were not so by the divine law, which ordained that the estates which were alienated should return to the first possessors every fiftieth year, to be computed from the day of establishing that usage, and that one should have power to alienate only the enjoyment of his estate for the number of years which should remain from the day of the alienation to the said fiftieth year, which was to restore all estates to the families of the first possessors. And likewise these alienations could not be made, except with a perpetual power of redeeming the estate whenever they would. It was only houses situated within walled towns, and which belonged to others than Levites, that could be alienated for ever.<sup>a</sup>

2184. This divine law, which prohibited perpetual alienations, in order to extinguish the desire of increasing our possessions, abolished by that means prescriptions. But the letter of this law being no longer in force, and alienations, which transfer the property for ever, being allowed with us, the use of prescriptions is wholly natural in the state and condition we are in; and so necessary, that without this remedy, every purchaser and every possessor being liable to be troubled to all eternity, there would never be any perfect assurance of a sure and peaceable possession. And even those who should chance to have the oldest possession would have most reason to be afraid, if together with their possession they had not preserved their titles.

2185. And therefore, although there were no other reason to justify the use of prescriptions besides the public advantage of ascertaining the quiet and tranquillity of possessors, it would be just to prevent the property of things from being always in an uncertainty, leaving still to the proprietors a time sufficient for recovering the possession of their estates.<sup>b</sup> But it may be said further,

<sup>a</sup> Levit. xxv 8

<sup>b</sup> L. 1, D de usurp et usuc

that prescriptions have otherwise their justice and their equity founded upon the principle which has already been remarked, that possession being naturally linked to the right of property, it is just to presume, that, as it is the master who ought to possess, so he who possesses ought to be master; and that the ancient proprietor has not been deprived of his possession, without just cause.<sup>c</sup>

2186. *Prescription of all Sorts of Rights.*—The same reasons which make that a long possession acquires the property, and that it strips the ancient proprietor, make likewise that all sorts of rights and acquisitions are acquired and lost by the effect of time. Thus, a creditor who has omitted to demand what is due to him, within the time regulated by the law, has lost his debt, and the debtor is discharged from it. Thus, he who has enjoyed a rent out of an estate during the time regulated for prescription cannot afterwards be deprived of it, although he should have no other title besides his long enjoyment of it. Thus, he who has ceased to enjoy a service during the time limited for prescription has lost the right to it: and, on the contrary, he who enjoys a service, although without a title, acquires the right to it by a long enjoyment, unless there be some custom which directs otherwise.<sup>d</sup> And, in general, all sorts of pretensions, and rights of all kinds whatsoever, are acquired and lost by prescription, unless they be such as the laws have particularly excepted. Thus, we see two effects of prescription, or rather two sorts of prescription. One which acquires to the possessor the property of what he possesses, and which divests the proprietor of his right because of his not possessing; and the other, by which all other kinds of rights are acquired or lost, whether there be any possession of them, as in the case of the enjoyment of a service, or whether there be no possession at all, as in the loss of a debt for want of demanding it.

2187. All these sorts of prescriptions, by which rights are acquired or lost, are grounded upon this presumption, that he who enjoys a right is supposed to have some just title to it, without which he had not been suffered to enjoy it so long; that he who ceases to exercise a right has been divested of it by some just cause; and that he who has tarried so long time without demanding his debt has either received payment of it; or been convinced that nothing was due to him.

<sup>c</sup> See the thirteenth article of the first section.

<sup>d</sup> See the eleventh article of this section, and the places which are there quoted

2188. *Two Sorts of Rules concerning Prescriptions.* — We must distinguish two sorts of rules relating to prescriptions; those which concern the different manners in which the laws have regulated the time for prescribing; and those which respect the nature of prescriptions and their use; that which may be subject to prescription; and that which is not; that which renders prescription just or vicious; the persons against whom prescription does not run; and what sort of possession it is that is required for prescribing; what may interrupt prescription; and other matters of the like nature. These are natural rules of equity; but those which mark the times of prescriptions are only arbitrary laws. For nature does not fix what time is precisely necessary for prescribing. So that these rules may be changed, and they are different in divers places: and this diversity is seen even in the Roman law, where prescriptions have been differently regulated in different times.

2189. Seeing the design of this book respects chiefly the rules of equity, we shall explain here those which are of this kind in the matter of prescriptions: and as to those rules which regulate only the time of prescriptions, we have not thought proper to put them down in articles, in the sections of this title, judging it to be sufficient to take notice of them here in the preamble. For besides that the times of prescriptions are differently regulated in many of the provinces of France, there are even some of the provinces which are governed according to the written law, in which they do not observe the several times limited for prescription by the Roman law. Thus, it will be sufficient to give here a short abstract of what was in use touching this matter in the time of Justinian. And it will be easy for every one to see, in every place, what the usage of that place is, as to the times of prescriptions, and wherein the several usages differ from the Roman law, or agree with it.

2190. Prescription in movables was acquired in the space of three years.\* As to immovables, the Romans made different distinctions in the prescription of them. The fair and honest possessor, who had a title, prescribed by a possession of ten years among those who were present, and of twenty years among those who were absent, although the person of whom he purchased had possessed it knavishly. And they reputed those to be present

\* *L. un. C. de usuc. trans; — Inst. de usuc. et long. temp. prescr.*

who had their abode in one and the same province.<sup>f</sup> He who possessed without a title prescribed by a possession of thirty years, and after that time he could not be molested by the proprietor.<sup>g</sup> Actions, that is, the right to make demands in a court of justice, such as the demand of an inheritance, of a legacy, a debt, a service, and other rights, were prescribed, in thirty years.<sup>h</sup> The action for recovering a mortgage did not prescribe but in the space of forty years, when the thing mortgaged was in the possession of the debtor, or of his heirs, or even in the hands of a third person, if the debtor was still living. Thus, the hypothecary action lasted longer in this case than the bare personal action. After the death of the debtor, it lasted only thirty years.<sup>i</sup> All the other sorts of prescriptions of goods or rights, of what nature soever they were, and as to which it might have been pretended that they ought not to prescribe in thirty years, were regulated to forty years; even as to goods and rights belonging to the church, and to the public.<sup>j</sup>

2191. All these different prescriptions have been reduced in many of the provinces of France, which have their peculiar customs, and even in those provinces which are governed by the Roman law, to one bare prescription of thirty years. And in the others they observe these different prescriptions of ten, twenty, thirty, forty years. And there are even some of them which have made some changes therein, and which have received the prescription of thirty years only for personal and mobiliary actions, and have extended the other prescriptions to forty years.

2192. It is not necessary to consider the motives of these different dispositions of the Roman law, nor the reasons why they are not observed in many of the customs. Every usage hath its views, and considers in the opposite usages, their inconveniences. And it sufficeth to remark here what is common to all these different dispositions of the Roman law, and of the customs, as to what concerns the times of prescriptions, which consists in two views: one, to leave to the owners of things, and to those who pretend to any rights, a certain time to recover them; and the other, to give

<sup>f</sup> L. 11, C. de præscr. long. temp.; — Nov. 119, c. 7; — l. ult. C. de præscr. long. temp.

<sup>g</sup> L. 3, C. de præscr. 30 vel 40 ann.

<sup>h</sup> L. 3, C. de præscr. 30 vel 40 ann.

<sup>i</sup> L. 7, § 1, C. de præscr. 30 vel 40 ann.; — d. l. § 2.

<sup>j</sup> L. 4, C. de præscr. 30 vel 40 ann. See the second article of the fifth section, and the remarks which are there made. Nov. 131, c. 6.

peace and quiet to those whom others would disturb in their possessions, or in their rights, after the said time is expired.

2193. We must take notice here of the difference which the Roman law makes between prescription in general and that kind of it which they distinguished by the name of *usucapio*. By *usucapio* they meant the manner of acquiring the property of things by the effect of them.<sup>m</sup> And prescription had also the same meaning, but it signified, moreover, the manner of acquiring and losing all sorts of rights and actions, by the same effect of the time regulated by law. We make this remark here, only to acquaint the reader that these two words, *præscriptio* and *usucapio*, which we shall meet with in several laws quoted on this title, are to be taken in the sense which the word *prescription* shall have in the articles where the said laws shall be quoted. For we shall never make use of the word *usucapio*; that of *prescription* being common, by our usage, both to the manner of acquiring the property of things, and to that of acquiring and losing all sorts of rights, by the effect of time.

2194. Besides these several sorts of prescriptions of the Roman law which have been just now mentioned, there are in France other sorts of prescriptions established by the ordinances, and by some customs which have regulated the time, which may be here added to the other sorts of prescriptions which have been mentioned:—

*The Power of Redemption belonging to the Kindred of a Family.*

— The action which the kindred of a family have for redeeming lands that are sold out of the family to strangers, which is established in general throughout the whole kingdom, by an ordinance of the month of November, 1581, and in particular, by several customs, prescribes in the space of one year, according to the said ordinance and the customs.

*Rescissions.* — Rescissions and restitutions of things to their former state prescribe in ten years, pursuant to the ordinance of 1510, art. 46, and that of 1535, § 8, art. 38, as shall be observed in the preamble to the first section of the title of *Rescission*.

*Servants' Wages.* — Actions for the wages of servants prescribe in one year, according to the ordinance of 1510, art. 67. And some customs have also fixed to one year the fees or demands of physicians, apothecaries, and surgeons.

<sup>m</sup> V. l. un. C. de usucap. transf.; — Inst. de usucap.



*Merchants' Accounts, and Tradesmen's Bills.* — The accounts of merchants who sell by retail, and tradesmen's bills, prescribe in six months' time, according to the ordinance of 1539, art. 19.

2195. *Peremption of Instance.* — The actions which one ceases to prosecute for three years together, without any proceedings in the cause, are lost by a prescription which is called peremption, which has this effect; that the instance is annulled, and has not so much as the effect to interrupt the prescription. And if the demand were not already extinguished by prescription, and the plaintiff had a mind to prosecute it, he would be obliged to begin a new instance, according to the ordinance of 1568, art. 15. This peremption has some relation to what Justinian had ordained, that instances should not last longer than three years.<sup>a</sup> Which it is not our business to explain in this place; for besides that this regulation does not agree with our usage, this matter does not come within the design of this book.

#### ART. I.

2196. *Definition of Prescription.* — Prescription is a manner of acquiring and losing the right of property in a thing, and all other rights, by the effect of time. Thus, a fair and honest possessor acquires the property of an estate by a peaceable possession during the time regulated by law; and the ancient proprietor is stripped thereof, for having ceased to possess it, or to demand it, during the said time. Thus, a creditor loses his debt, for having omitted to demand it within the time limited for prescription, and the debtor is discharged from it by the long silence of his creditor. Thus, other rights are acquired by a long enjoyment, and are lost for want of exercising them.<sup>a</sup>

#### II.

2197. *The Motive of Prescription, and its Effect.* — Seeing prescriptions have been established for the public good, that the property of things and other rights may not be always in an uncertainty, he who has acquired the prescription has no need of a title; the prescription being to him instead of a title.<sup>b</sup>

<sup>a</sup> V. l. 13, C. de judic.

<sup>a</sup> L. 3, D. de usurp. et usuc. See the ninth article. L. 2, C. de prescr. longi temp.

<sup>b</sup> L. 1, D. de usurp. et usuc. This article is to be understood only of prescriptions which may be acquired without a title, and not of the prescription of ten and twenty years, of which mention has been made in the preamble, and which supposes a title.

## III.

2198. *When it is acquired.*—Prescription being founded on the duration of the possession during the time regulated by law, it is acquired only after the said time is elapsed.\*

## IV.

2199. *The Possessor joins to his Possession that of his Author.*—If a possessor chancés to die before he has acquired the prescription, and his heir continues in possession, we join together the time of the possession of the one and the other, and the prescription is acquired to the heir after the possession of his author and his own joined together have lasted the time regulated for prescribing. And the same thing holds in the possession of the buyer joined to that of the seller to whom he succeeds, and in the possession of the donee and donor, of the legatee and testator, and in the same manner of all those who possess successively, having right the one from the other.<sup>d</sup>

\* *L. 6 et 7, D. de usurp. et usuc.*; — *l. 15, D. de div. temp. præscr.* We have conceived this rule in these general terms, after the time of the prescription is elapsed, because in whatever sense we understand this time, whether it be that we will have the prescription to end at the beginning of the last day, or only the last moment of the last day, it holds still true, that the time necessary to prescribe must be elapsed. Which we have done to avoid saying that the prescription is acquired only at the last moment of the time regulated for prescribing; because this expression would be contrary to the texts cited on this article. But according to our usage, prescription is acquired only at the last moment of the last day. And a demand made on the last day would interrupt the prescription. For although the effect of prescription be favorable, when it is once acquired yet this favor is not extended so far as to shorten the time that is necessary for stripping proprietors of their right. And that which can hinder the prescription before it be acquired ought to be favorably received for reinstating the owner in his right. Thus, it is just to receive a demand for interrupting the prescription, provided the last moment be not yet expired, according to the rule which was observed in the Roman law for those kinds of actions which were called temporal, in which prescription had not its effect, till after the last moment was expired. *L. 6, D. de old. et action.* Which was also observed, as we likewise do, in computing the time of minority, which in France ends only at the last moment of the age of twenty-five years, as shall be shown in the twentieth article of the second section of the *Recession of Contracts*. And in fine, wherever ten, or twenty, or thirty years are necessary for a prescription, the years ought to be understood according to the ordinary computation, which comprehends all the moments of all the days necessary to make up the year. And this computation is particularly just in the prescriptions which one law terms odious. *L. ult. C. de ann. excep.*; — *v. l. 2, D. de divers. temp. præscript.* To which we may add, that the texts cited upon this article do not speak of all sorts of prescriptions indifferently, but only of that particular kind of prescription which the Romans called *usucapio*, and therefore they ought not to be extended to the other kinds of prescriptions which we do not distinguish from *usucapio*. See the difference between prescription in general and the kind of it called *usucapio*, at the end of the preamble to this section.

<sup>d</sup> *L. 14, § 1, D. de div. tem. præscr.*; — *l. 2, § 20, D. pro emptore*; — *l. 76, § 1, D. de*

## V.

2200. *A Case where the Possession of another than the Author avails the Possessor.*— Possession is not only continued between two possessors, one of whom derives his right from the other; but it may happen that a possessor may acquire the prescription by joining to his possession that of another person, from whom he does not derive his right. Thus, for example, if an heir possesses during some time a thing bequeathed to another person before it is delivered to the legatee, whether it be that they wait for the event of the condition of the legacy, or that it is occasioned barely through delay, the time of that possession will serve to acquire the prescription to the said legatee, although he does not derive his right from the heir.<sup>a</sup> For the possession of the testamentary heir, who represents the testator, is considered, as if it were the testator himself who had possessed. Thus, in the like cases, it is by equity, according to the circumstances, that we are to judge if the possessions of several persons may be joined.<sup>b</sup>

## VI.

2201. *Possessions Interrupted.*— The possessions of divers possessors, who succeed the one to the other, are joined only in the cases where they follow one another without interruption. But if there be any interval of another possession of a third person who has interrupted those possessions, the possessions which had preceded the said interruption would be useless to the last possessor. For prescription is acquired only by a continued possession, which one enjoys peaceably during all the time regulated for prescribing.<sup>c</sup>

*contr. empt.*; — *L. 13, § 10, D. de acq. vel amitt. poss.*; — *L. 13, § 11, D. eod.*; — *L. 11, C. de præsc. long. temp.*

<sup>a</sup> *L. 13, § 14, D. de acq. vel amitt. poss.*

<sup>b</sup> *L. 14, D. de divers. temp. præscr.*

<sup>c</sup> *L. 15, § 1, D. de div. temp. præscr.*; — *L. 20, D. de usurp. et usuc.* But if this interruption had been caused only by some usurpation, or by a trouble given without any just ground; as if a third person had recovered the thing at law from one of the possessors under a false title, and by a sentence which was afterwards reversed upon an appeal; this trouble having ceased, would it not be just, not only to join together the possessions, but even to thicken them the time of the said trouble? Since it would be true, that the former trouble not having proceeded from him who should occasion the new interruption, it would be altogether useless to him; and that the possessor would have retained his right during an interruption which would be found to have been only an unjust trouble, and which would not have hindered him from remaining master, with an intention to possess, which had the same effect as possession, and rendered his condition like to that of a possessor thrust out of possession by force, who is nevertheless considered as possessor. *L. 17, D. de acq. vel amitt. poss.* See the twenty-fourth article of the second section.

## VII.

2202. *Intervals without any apparent Possession.* — The intervals in which the possessor ceases to exercise his possession do not interrupt it, and do not hinder him from continuing his prescription. Thus, when a possessor, being either absent or negligent, ceases for some years to go upon his estate and to cultivate it, he retains nevertheless his possession. And he joins not only the times of his actual exercise of his possession, but he adds to them likewise the interval wherein he ceased to exercise it.<sup>b</sup>

## VIII.

2203. *Interval without a Possessor, which does not interrupt the Prescription.* — It may happen that there may be an interval without a possessor, which does not interrupt the prescription. Thus, when an executor, who was either absent or was ignorant of his right, does not take possession of the estate till some time after the succession has been open, he will nevertheless join to his possession that of the deceased, and even the time of the interval between the falling of the inheritance and his entering to the possession of it. For the goods are preserved to the future heir or executor, and are as it were possessed by the inheritance itself, which holds the place of master.<sup>1</sup>

## IX.

2204. *What Things may be prescribed.* — We may acquire by prescription all things which are in commerce, and of which we may have the property,<sup>1</sup> if the law makes no exception thereto, as will appear in the fifth section.

## X.

2205. *Rights and Actions prescribe.* — The use of prescription is not only to acquire the property to those who have prescribed by possession, and to divest the proprietors of it, who have suffered others to prescribe; but there is yet another use of prescriptions, in which possession is not necessary, which is that of annul

<sup>b</sup> L. 4. C. de acq. et ret. poss. See the twenty-fourth article of the second section.

<sup>1</sup> L. 13, § 8, in f. D. quod vi aut clam.; — l. 31, § 5, D. de usurr. et usuc. This article may be applied likewise to the heir at law, or next of kin, who succeeds to one dying intestate, although by our usage he be seized and possessed of the estate by the death of him to whom he succeeds. For if he is ignorant of his right, he does not possess the goods although he be master of them.

<sup>1</sup> This is a consequence of the rules explained in the first two articles.

ling the rights and actions which one has ceased to exercise during a time sufficient for prescribing. Thus, a creditor loses his debt, and all rights and actions are lost, although those who are debtors of them possess nothing, if a demand is not made of the debt, or if one ceases to exercise his right during the time regulated by law.<sup>m</sup>

## XL

2206. *A Case where one prescribes Things that are out of Commerce.*— One may acquire or lose by prescription certain things which are out of commerce. And they are acquired by their connection with others, of which one may have the property. Thus, he who acquires an estate to which is annexed a right of patronage, or of which the manor-house has a chapel in it for the use of the master, may prescribe this right of patronage, and the use of the chapel.<sup>n</sup>

## XII.

2207. *Services prescribe.*— Services are acquired and are lost by prescription.<sup>o</sup>

## XIII.

2208. *A sincere Belief of one's Right necessary for prescribing.*— To acquire prescription, it is necessary to have possessed honestly and fairly, that is, that the possessor must have been persuaded that he had a just cause of possession, and must have been ignorant that what he possessed did belong to another person. And this integrity is always presumed in every possessor, if it is not proved that he has possessed with a bad conscience, knowing the thing to be another's.<sup>p</sup> But although an upright and sincere belief of one's right be a just cause which gives a right to prescribe, yet it is not always sufficient of itself, and it is necessary over and above that the prescription be not obstructed by any one of the causes which shall be explained in the following section.<sup>q</sup>

<sup>m</sup> L. 3, C. de presc. 30 vel 40 ann.

<sup>n</sup> L. 62, D. de acq. rer. dom. Although this text have no precise relation to the rights mentioned in this article, yet it may be applied to them.

<sup>o</sup> See the eleventh article of the first section of *Services*, with the remark made upon it, and the fifth and following articles of the sixth section of the same title.

<sup>p</sup> L. 109, D. de verb. sign.; — l. 32, § 1, D. de usurp. et usuc.; — § 3, Inst. de usuc. et long. temp. prescr. See the first article of the fourth section of the title of *Presc.*

<sup>q</sup> L. 24, D. de usurp. et usuc.

## XIV.

2209. *Prescription without a Title.*—Seeing possession, joined with a sincere belief of one's own right, is sufficient for prescribing things which are capable of prescription, and that it holds the place of a title, although one have not any other; the possessor who has prescribed, whether he be ignorant of the origin and cause of his possession, or that, having had a title, he is not able to justify it, will be maintained against the ancient proprietor who shows a title. In the same manner as a debtor who has prescribed the debt has no need of an acquittance to be discharged from the demand of his creditor. For prescription annuls the titles of the proprietors and creditors. And they ought to blame themselves for having neglected their rights for so long a time.

<sup>r</sup> L. 1, *D. de usurp. et usucap.*; — l. 3, *C. de præsc. 30 vel 40 ann.* See the ninth article.

It is necessary to take notice here, that what is said in this article, of its not being necessary for prescribing to have a title, ought to be so understood as not to confound the law of those provinces in France where there is only one prescription of thirty years, which demands no title, with that observed in other provinces, where they distinguish, according to the Roman law, this prescription of thirty years from that of ten and twenty years, which presupposes a title, as has been remarked in the preamble to this section.

It is likewise to be observed, that we have not comprehended in this article the case where the possessor never had a title; because we cannot suppose an honest, upright possession which has not proceeded from some title or other; that is to say, which has not had some just foundation in its beginning, and some lawful cause which gave a right to possess, although there remain no deed or other proof thereof; for otherwise the possession would be knavish and dishonest. And even he who should put himself in possession of an estate that is vacant, such as any land that is part of an inheritance which is abandoned, or any tenement belonging to one who has been absent for a long time, would be a dishonest possessor, seeing he could not but know that he had usurped what another ought to have. L. 37, § 1, & 4. 38, *D. de usurp. et usuc.*; — l. ult. *Cod. unde vi.*

But although such a possessor be in the same condition with a usurper, *sancimus talem possessorem (qui vacuum possessionem absentium, sine judiciali sententia detinuit) ut prædonem intelligi. D. l. ult. C. unde vi.* If, nevertheless, he has possessed for the space of thirty years, which acquires a prescription without a title, the same law and the eighth law; § 1, *C. de præsc. 30 vel 40 annor.*, and likewise the first law, § 1, *C. de ann. except.*, will have him not to be troubled any more after so long a time, notwithstanding he knew that he had no right to what he possessed. The meaning of which is not as if these laws justified this possessor in point of conscience; but only that the civil policy does not permit that possessors be molested after a long possession, or that they be obliged to make good their titles, or even to declare the origin of their possession. For the pretext of inquiring after unjust possessors would disturb the peace and quiet of just and lawful possessors. But as to the point of conscience, it is most certain that the length of time does not secure unjust possessors from the guilt of sin, and that, on the contrary, their long possession is only a continuation of their injustice. And therefore it is that the canon law does not allow that an unjust possessor can ever prescribe, how long soever his possession may have been. *Possessor male fidei ullo tempore non prescribit. Reg. 2, de reg. jur. in 6; — C. ult. extra de præscript.*

And it is likewise our usage, that, although the possessor who has prescribed be not

## XV.

2210. *If the Possessor has lost his Title.* — In the places, and in the cases, where prescription presupposes a title to be proved, if he who has prescribed has lost his, he shall nevertheless be maintained in his possession; provided he has proofs of the truth of the title which is lost.\*

## XVI.

2211. *Of him who purchases fairly and honestly of an Unjust Possessor.* — The integrity that is necessary for acquiring prescription is considered only in the person of him who has possessed, and the knavery of his author ought not to harm him. Thus, he who believes that the seller of whom he buys a thing is master of what he sells him does nevertheless prescribe, although the seller were a usurper.†

## XVII.

2212. *Difference between a Good and a Bad Conscience in one and the same Case.* — It may happen, by a consequence of the rule explained in the foregoing article, that, in the case of two possessors of two parts of an estate that was usurped, the one may be maintained by prescription, and the possession during the same time be useless to the other. Thus, for example, if an unjust possessor sells one half of an estate which he has usurped, reserving to himself the other half, and the purchaser of the half that is sold having possessed it with a good conscience during the time of prescription, and the seller having likewise possessed the other half during the same time, the proprietor demands to be restored to his estate, and brings his action against both the possessors; the purchaser of the half that was sold will be maintained in his possession, by the effect of his good conscience; and the proprietor will be able to recover only the other half from the usurper,

obliged to prove his title, nor to declare the origin of his possession, yet nevertheless, if it is discovered, and it be found to be knavish, the possession will be useless against the master who shall prove his right. Thus, a depositary, who in that quality had possessed a thing for upwards of thirty years, would not have acquired the prescription. See the eleventh article of the fifth section.

\* *L. 7, C. de præscr. long. temp.* We must apply the use of this article to the provinces which observe the prescription of ten and twenty years, according to the Roman law. See the preamble to this section. See the eleventh article of the second section of *Progr.*

† § 7, *Inst. de usucap.*; — l. 4, § 27, *D. de del. mal. et mal. acc.* See the third article of the third section, and the eighteenth and nineteenth of this section.

whose bad conscience, or knowledge of his possessing another man's estate, will have hindered the prescription.\*

## XVIII.

2213. *The Heir or Executor is answerable for the Knavery of the Deceased.* — We must not comprehend under the rule explained in the sixteenth article the heir or executor who enters with a good conscience on the possession of the goods of the inheritance. For as he is universal successor, who inherits all the rights of the deceased, and who obliges himself to all the charges the deceased was liable to, so he is likewise answerable for all his deeds. Thus, although the heir or executor were ignorant of the vice of the possession of the deceased who had possessed with a bad conscience, yet he could not prescribe what the deceased had usurped.\*

## XIX.

2214. *But not the Legatee or Donee.* — Legatees and donees are not answerable, as the heir or executor is, for the deed of the testators and donors; because they do not succeed to all their goods and to all their rights, and so are not bound for all their charges. And if they have received with a good conscience what has been bequeathed or given to them, although the testator or donor had possessed the thing knavishly and with a bad conscience, knowing it to be another's, yet that will not hinder them from prescribing, if they possess it peaceably during the time regulated by law.†

\* L. 5, C. de usuc. pro emp. • See the ninth and tenth articles of the fifth section.

† L. 11, D. de divers. temp. prescr.; — v. l. 4, § 15, D. de usurp. et usuc.; — l. ult. C. com. de usuc.; — l. 11, C. de acq. et ret. poss. But if the heir or executor of him who had acquired with a good conscience knows that the thing belonged to another person, will not his knowledge of the other's right to the thing which he possesses, if the same is well proved, hinder him from prescribing? It is said in some laws, that, if the deceased has made the purchase with a good conscience, his heir shall prescribe, although he knows that the thing belonged to another, and not to the seller. L. 2, § 19, D. pro emptore; — l. un. C. de usuc. transf. And another law, makes this distinction in the matter; that if the deceased had not begun to possess, and that the delivery of what the deceased had bought was only made to his heir, who knows that the thing did not belong to the seller, the heir shall not prescribe, because the good conscience is considered in the beginning of the prescription. But if the delivery had been made to the deceased, and he had possessed with a good conscience, this possession, being continued in the person of the heir, will acquire to him the prescription, although he know that the thing was not the seller's. L. 43, D. de usurp. et usuc. One may judge by the remark which has been made on the fourteenth article, that, if it were well proved that this heir knew what he possessed to be another's, the good conscience of the deceased ought not to justify his possession.

† L. 5 D. de divers. temp. prescr. See the seventeenth article. • This article is not to



## XX.

**2215. Prescription of the Arrears of Rents and of other Annual Duties.**—The debtor of a rent, or of a pension, or of other things which are paid yearly, may prescribe the rent or pension of each year, if it is not demanded within the time regulated by the law, to reckon from the day that it fell due, even although the principal debt could not be prescribed. Thus, those who owe rights which are not liable to prescription, such as quitrents in some provinces, may prescribe the arrears of such rights, if they are not demanded within the time that the prescription of them takes place; and the arrears of each year are prescribed within the time appointed for prescription, to be computed from the moment that the arrears of that year fell due.\*

be understood of those who are universal donees and legatees, to whom the whole estate of the deceased, or a certain quota of it, is given or bequeathed, and who hold the place of heirs or executors; but of particular donees and legatees, to whom a certain particular thing is given or bequeathed.

Although particular legatees and donees, to whom a certain thing is given or bequeathed, be not accountable, in the same manner as the heir or executor, for the act of the testator and donor; yet nevertheless, seeing they acquire by a lucrative title, which distinguishes their condition from that of a buyer, or other who acquires for a valuable consideration, it may be doubted whether the rule explained in this article may give them as great security in point of conscience as it does in their possession. And if we suppose, for instance, that he who had wrongfully seized on an estate belonging to a poor man had bequeathed it or given it away to a rich person, who, after having acquired the prescription, being ignorant of the vice in the acquisition made by his author, comes to discover the usurpation; could this legatee or donee in conscience make use of the right which the law gives him to retain this estate, which to him would be superfluous, and which would be so necessary to those whom his benefactor had unjustly deprived of it? We put the question in these circumstances; for if we suppose, on the other hand, that the legatee or donee was a poor man, and those to whom the estate was to return were persons at their ease, the integrity of the legatee or donee, who knew nothing of the other's right till after his prescription, would seem to be a just cause why he might lawfully take advantage of the right which the law gives indifferently to all legatees.\*

Seeing this question is a matter of conscience, and for that reason does not come within the design of this book, we shall not insist any longer on it, and shall only remark, that the questions of this nature, where the business is to examine in one's own conscience the use which a possessor may make of the prescription which he has acquired, in the cases where some duty may raise a scruple whether it be lawful to make use of it, ought to be decided by the spirit of the second law, and by the use which it allows to be made of the law of prescriptions. For this law having been enacted only for the public good, upon the motives already explained, it does not enter into the secret of the duties of conscience which may render the use of prescription unlawful. And in that every one ought to take for his rule the spirit of the second law, on which depends the good use of all the others.

\* *L. 7, § ult de prescr. 30 et 40 ann.* According to the ordinances of 1510, art. 71, the arrears of annuities cannot be demanded but within the space of five years after they fall due, which is not to be extended to ground-rents. \* And in some of the customs in France, the arrears of quitrents are prescribed in a shorter time. e.

XXI.

2216. *Prescription may be acquired, although we have not Possession in our own Hands.* — Seeing prescription is acquired by possession, and that we may possess by other persons, we may therefore prescribe, not only by having the possession in our own hands, but also by others who possess for us; as by a farmer, a tenant, a depository, a usufructuary, a tutor, a guardian; a factor, or agent.\*

SECTION V.

OF THE CAUSES WHICH HINDER PRESCRIPTION.

ART. I.

2217. *Causes which make the Prescription to cease.* — The effect of prescription ceases in the cases where the law renders it useless. Which happens either through the nature of the thing, or by the quality of the person against whom the prescription is pleaded, or by reason of some vice in the possession, or because of the interruption, as we shall see in the articles which follow.\*

II.

2218. *What Things cannot be prescribed.* — Seeing prescription is one of the ways of acquiring property, we can prescribe only such things as are in commerce, and of which we may become masters. Thus, we cannot acquire by prescription the things which nature or the law of nations destine to a common and public use, such as the banks of rivers necessary for navigation, the walls and ditches of towns, and other the like places. Neither can we prescribe that which the law renders imprescriptible, such as in France the king's demesnes, which cannot be acquired by prescription, even of a hundred years.\*

\* See the eighth and ninth articles of the first section.

\* This article results from those which follow

\* Usucapionem recipiunt maxime res corporales, exceptis rebus sacris, sanctis, publicis populi Romani, et civitatum. L. 9, D. de usurp. et usuc, — § 1, Inst. eod. Prescriptio longæ possessionis, ad obtinenda loca juris gentium publica, concedi non solent. L. 45, eod. Res fisci nostri usucapti non potest. § 9, Inst. de usuc; — l. 2, C. comm. de usuc. Viam publicam populus non utendo amittere non potest L. 2, D. de via publica.

By the ordinance of Francis I, bearing date the 30th of June, 1539, every thing which belongs to the king's demesnes is imprescriptible, even by a possession of a hundred

## III.

2219. *Prescription of Debts due at a certain Term, or on a certain Condition.*—The prescription of actions for debts, or other things which are due upon some condition, and which cannot be demanded till after the condition has happened, begins to run only from the day on which the condition was accomplished; from which time the creditor began only to have a right to demand the thing. And the prescription of debts which are to be paid at a certain term begins to run only after the term is elapsed.

## IV.

2220. *Prescription does not run against Minors.*—One cannot prescribe against minors during their minority, and the prescription does not begin to run till after they have attained the years of majority.<sup>d</sup> For the time of prescription being given to proprietors

years. And by several customs, quitrents cannot be prescribed against the lord of the manor.

We have not comprehended indifferently in this article all things belonging to towns, as one may be apt to think that they are comprehended in the first of the texts cited on this article: and we have put down in it only things which are of public use. For as to other things belonging to towns, or churches, hospitals, and corporations, and which for that reason are out of commerce, and cannot be alienated except for certain causes, and after a due observance of the formalities prescribed for these sorts of alienations, they are not for all that imprescriptible. But one may prescribe by the time regulated by the laws and customs the goods and rights belonging to churches, to towns, and corporations, and to all other bodies politic. Thus, in the Roman law, these sorts of goods and rights are prescribed by forty years' possession, even without a title. *L. 4, C. de prescr. 30 vel 40 ann.*; — *v. l. 6, cod.*; — *l. ult. C. de fundis patrim.* — *Nov. 131. c. 6.* There were only the burdens of the public taxes upon lands or houses, which were called *tributa, indictiones, functiones publicæ, civiles canones*, that could not be prescribed: *L. 3, C. de prescr. 30 vel 40 ann.* And many of the customs of France do expressly regulate, that one may prescribe against the church by a possession of thirty years.

We have not put down in this article things that are consecrated; for they are of another nature than the things specified in the article, which by their situation, and by the necessity of their use, are imprescriptible; whereas things consecrated are not such by their nature, but only by an express destination, and therefore may be profaned and alienated, and return again into commerce. A church may be profaned or demolished, and translated to another place. So that it is by the circumstances that we are to judge if a long possession may suffice to acquire the property of a place which had been formerly consecrated, if there were ground to presume that the place had been lawfully alienated; or if the possession appeared to be a usurpation. And the same thing might happen in a place of public use, such as the ditch of a town, or other thing of the like nature, if any change had restored these things to commerce again, and had rendered them subject to prescription.

<sup>c</sup> *L. 7, § 4, C. de prescr. 30 vel 40 ann.*

<sup>d</sup> *L. 3, C. quib. non obijc. long. temp. prescr.* We do not make here the distinction which the Roman law made in the matter of prescriptions, between infants who have not

that they may recover their goods and their rights, this time does not run against persons whom the laws do not allow to have the administration of their own goods.

## V.

2221. *If a Major happens to be interested with a Minor.* — If one that is major happens to have a right undivided with a minor, the prescription which could not run against the minor will have no effect against the major. Thus, for example, if a service of a passage is due to a major and to a minor, for a ground which is common to them both, the one and the other having ceased to make use of this right during the time sufficient to prescribe, the service which the minor could not lose by prescription will be preserved likewise for the major. For the service was due for the whole ground, and the minor having his right undivided upon the whole, there was no part of the ground for which he had not preserved the right of service.

## VI.

2222. *In what Sense it is that Prescription does not run against Absent Persons.* — The same reason for which prescription does not run against minors hinders it likewise from running against those whom a long absence disables from pursuing their rights. Which is to be understood, not only of an absence on the account of public business, but also of other absences occasioned by accidents, such as captivity. And if the absence has not lasted the whole time of the prescription, the time which it has lasted is deducted from it.<sup>1</sup> But if the right which one should pretend to make

attained to ripeness of age, that is, to fourteen years in males and twelve in females; and adults, that is, those who have attained to the said ripeness of age, but are still minors under the age of five-and-twenty years. This distinction of the Romans consisted in this, that the adults not being any more under the direction of tutors, but under the care of curators, the prescription of thirty years began to run against them, but it did not run against infants who were under the age of adults. L. 3, C. de præscr. 30 vel 40, ann. For since according to our usage in France minority lasts to the age of five-and-twenty years, and that minors, being under guardianship, are excluded from the administration of their estates, prescription does not run against them.

• L. 10, D. quem. æro. mitt. See the twenty-first article of the first section of *Services*. But if the ground that belonged in common to the major and to the minor had been divided into shares or portions, the service which would be preserved for the portion of the minor would be lost for the portion of the major; because in this case their cause was not common.

L. 2, C. quibus. res. objic. long. temp. præscr.; — l. 4, eod.; — l. 1, C. si per vim, vel alto mod. abo. pert. sit. poss.; — l. 1, D. de divers. tempor. præscr.; — l. 25, D. de stip. serv. We

the absent person lose by prescription had fallen to him during his absence, and without his knowledge, such as a legacy or an inheritance, or if the absence had lasted during the last years of the prescription, there would be still more reason for his being restored to his right; for one could not impute to him the letting that time slip without suing for his right.

## VII.

2223. *In what Sense it is that the Wife's Dowry does not prescribe.* — The wife's dowry cannot be prescribed during the marriage.<sup>s</sup>

must distinguish, in the matter of prescription, two sorts of absence; that which is spoken of in this article, of persons whom some cause keeps at a distance from the place of their abode, such as an embassy, a captivity, and others the like; and that which has been mentioned at the end of the preamble to the fourth section, in relation to the prescription of ten or twenty years, that was in use among the Romans; where it is said, that a prescription grounded upon a title is acquired within the space of twenty years, against absent persons; which has no relation to the absence that keeps one at a distance from his dwelling, but respects barely the distance of one person from another, because of the distance of their habitations. It is easy to perceive, that we are not to confound together these two sorts of absence, and in what manner that which concerns the prescription of twenty years ought to have its effect in the places where this prescription is received. But as to the other absence, which is the absence of a person from his own dwelling, it is not so easy to determine precisely in what manner it can hinder the prescription. And although the rule be conceived in general terms in this article, as it is likewise in some of the texts cited upon it; yet we are not to understand it in such a large sense, as if all sorts of absence hindered all prescription. For by the third law, *C. de prescr. 30 vel 40 ann.* it is said that absence does not hinder the prescription of thirty years. And as to the prescription of ten and twenty years, there may happen difficulties therein because of the circumstances, either of the cause of the absence, or of its short duration, or others of the like nature, which may give occasion to doubt whether the absence does or does not hinder the prescription; concerning which it is not possible to give certain and precise rules. And even as to the prescription of thirty years, if we suppose that the person against whom it is pleaded had been absent on an embassy for some years, would it not be reasonable to deduct from the time of the prescription the time of that absence? Thus it is by the circumstances that we are to judge of the effect of absence in prescriptions.

<sup>s</sup> *L. 16, D. de fund. dotal.* This article is to be understood according to the different usages of the places. By the customs of some of the provinces in France, the wife's dowry may be alienated by the husband and wife together, but not by the husband alone or the wife alone. In others the alienation is null, although the wife have consented to it. Among these last customs, some of them annul absolutely the prescription of the wife's dowry. Others annul it only in case the husband or his heirs be insolvent, so as that they are not able to make good the dowry that is prescribed. So that it is according to the different dispositions of the customs, and their usages, that we are to regulate the manner in which prescription is to take place in women's dowries. See the thirtieth article of the first section of the title of Dowries.

## VIII.

2224. *Warranty does not prescribe.*—The action of warranty does not prescribe. For a seller, for instance, and every other person who engages to warrant what he sells, assigns, or gives upon any other title, obliges himself thereby to maintain the purchaser in a peaceable possession, so as never to be molested therein by any right precedent to the alienation. Thus, in what time soever the eviction happens, as if, after a possession of a hundred years, the purchaser is evicted of an estate which is found to be part of the demesnes of the crown, the heirs of his author will be bound to warrant him against the said eviction.<sup>a</sup>

## X.

2225. *The Possessor's knowing that the Thing belongs to another hinders the Prescription.*—There happen often in possessions vices or defects which hinder prescription. Thus, the knavery of the possessor hinders him from prescribing, whether it be that he has seized upon the thing without any pretence of right, or that, having a title, he was not ignorant of the defect thereof; as if he has purchased that which he knew the seller could not alienate.<sup>1</sup> We shall see, in the following articles, the other vices of possessions which may hinder prescription.

## X.

2226. *If several Possessions are to be joined together, a Good Conscience is necessary in every one of them.*—If a possessor who pretends to have acquired the prescription, not having possessed the thing during the whole time that is necessary for prescribing, has occasion to join to his own possession that of his author, as of a testator, a donor, a seller, or other person from whom he derives his right; it is not enough that he himself has possessed it with a good conscience, but it is necessary likewise that the possession which he joins to his own have been a possession held with a good conscience.<sup>1</sup> For all possession necessary for prescribing ought to have been without knavery, and without consciousness of another's right.

<sup>a</sup> L. 21, C. de evict. See the sixth article of the tenth section of the *Contract of Sale*.

<sup>1</sup> L. 3, § 3, D. de acq. vel amitt. poss.; — l. 12, D. de usurp. et usuc. See the sixth article of the third section.

<sup>1</sup> L. 13, § 1, D. de acq. vel amitt. poss.; — l. 4, § 27, D. de apli mali et met. except. See the third article of the third section, and the sixteenth article of the fourth section.

## XI.

2227. *Another Vice in Possession, which hinders Prescription.* — Those who possess for others cannot prescribe what they possess in this manner. Thus, he who possesses precariously,<sup>m</sup> the depositary,<sup>n</sup> the creditor who has a pawn,<sup>o</sup> the usufructuary,<sup>p</sup> the farmer or tenant,<sup>q</sup> cannot acquire by prescription what they hold by these titles. For in order to prescribe, it is necessary to possess, and to possess as master; and in all these sorts of possession, it is the master who possesses by him who holds the thing in his hands. And they who hold the things by these titles cannot without knavery pretend to be proprietors of them.

## XII.

2228. *In what Sense the Possessor cannot change the Cause of his Possession.* — He who happens to have a thing in his custody, which he has not right to possess as master, cannot change his condition, and make to himself another title of possession, to the prejudice of the right of another person. Thus, for instance, he who is in possession of a ground, as farmer, cannot make himself proprietor thereof by a feigned purchase from another seller than the master to whom he is farmer. For this new title would not change the quality of his possession, and would not give him the right to possess as master, nor to prescribe against him of whom he held the farm. Thus, for another instance, the heir of a depositary cannot pretend to possess the thing deposited, as heir, and he will always have the quality of a depositary.<sup>r</sup> But if an heir, happening to discover that a ground which he possessed as heir was not part of the inheritance, had bought it honestly of the person who pretended to be master of it, in order to possess it, not any longer as heir, but by the title of sale, one could not accuse him of having changed the cause of his possession in order to palliate a vicious possession with an apparent title; and he would

<sup>m</sup> L. 2, C. de præscr. 30 vel 40 ann.

<sup>n</sup> L. 17, § 1, D. de poss.

<sup>o</sup> See the seventh article of the fourth section of *Pawns and Mortgages*. L. ult. C. de pign. act.; — l. 10, eod.; — l. 13, D. de usurp. et usuc.; — l. 15, § 2, D. qui satisd. cog.; — l. 22, § 1, D. de moral. act. We add these texts to show, by the by, what has been already remarked touching the different ideas that one may conceive of possession. See what has been said on this subject at the end of the preamble to this title.

<sup>p</sup> § 4, Inst. per quas person. cuiq. acq.

<sup>q</sup> L. 6, § 2, D. de precar.; — l. 25, D. de acq. vel am. poss.

<sup>r</sup> L. 3, § 19, D. de acq. vel amitt. poss.; — l. 5, C. de acq. et ret. poss.; — l. 2, § 1, D. pro hered.



acquire by this new title both the right to possess as master, and the right to prescribe.\*

## XIII.

2229. *A Vice in the Title hinders the Prescription.* — It is likewise a vice in the possession, that it has begun by a false title, and of which the defect was such that the possessor ought to have known it, although he should pretend to have been ignorant thereof. Thus, for example, he who buys of a tutor a house or lands belonging to his minor, without observing the formalities, cannot prescribe it, under pretext that he verily believed that the tutor had power to alienate it. For he ought to have known that the goods of the minor could not be alienated except for necessary causes, and when the formalities prescribed by the laws in such alienations were observed. And this being such a rule, that his ignorance thereof could avail him nothing, his condition is not distinguished from that of a purchaser who was apprised of the defect of the title.\* Thus, for another example, he who purchases a house or lands held of a church-benefice, and which is alienated by the incumbent without a necessary cause, and without observing the formalities, cannot prescribe them.

## XIV.

2230. *A Vice in the Title, which does not hinder Prescription.* — There may be vices in the titles which may be sufficient to annul them, but not sufficient to hinder prescription. Thus, for example, if the person to whom a house or lands have been devised, has been put into possession thereof by him whom he took to be heir, and after the said legatee had enjoyed the said house or lands for a time sufficient to acquire prescription, it be found that he who called himself heir was not the true heir, or that he had coheirs, and that the true heir or coheirs trouble the legatee in his possession, and allege against him nullities in the testament, as that it was not attested by a sufficient number of witnesses duly qualified, or that other formalities were wanting; these defects of the testament will not hinder the effect of the prescription of this legatee, whether he was ignorant of them, or whether he knew them. For he had the apparent heir's approbation of the testa-

\* L. 19. § 1, *D. de acq. vel am. poss.*

\* L. 31, *D. de usurp. et auc.*; — l. 2, § 15, *D. pro emptore*. See the ninth article of the first section of the *Rules of Law*.



ment, which was sufficient, together with his own good conscience, to acquire to him the right of prescription.<sup>u</sup>

## XV.

2231. *A Demand made judicially interrupts the Prescription.*—The prescription is interrupted, and ceases to run by making a demand in a court of justice against the possessor. For in order to prescribe, it is necessary that the possession have been peaceable, and with a good conscience; and the demand in a court of justice makes the possession to be no longer peaceable, and makes the possessor to hold it afterwards with a bad conscience, when he knows of the other's right.<sup>x</sup>

## XVI.

2232. *A Demand made by one of many Creditors.*—If one and the same right, whether it be that of property or any other, belongs in common to many persons, the action entered by any one of them will interrupt the prescription for them all. For it is the whole right that is demanded, and every one preserves by this demand that share of the right which belongs to him.<sup>y</sup>

## XVII.

2233. *A Demand made against one of many Debtors.*—If several persons happen to be bound for one and the same debt, or to

<sup>u</sup> This is a consequence of the third article of the third section. There is this difference between the case of this article and that of the foregoing article; that in this the vice of the testament ceased by the approbation of the heir, and that the will of the testator might be executed notwithstanding the want of the formalities in the testament; but in the case of the foregoing article, the vice of the title was the incapacity of the person who had alienated, contrary to the prohibition of the law, the goods of a minor. *J. l. 25, § 6, D. de hered. pet.*

<sup>x</sup> *L. 10, C. de prescr. long. temp.*; — *l. 10, C. de acq. et ret. poss.* What is said in this article is to be understood of a demand that is reduced into a libel, which explains what is demanded. As to which it is necessary to remark, that whereas in the Roman law he who summoned his adversary was bound only to explain in the presence of the judge what it was that he demanded; and that even Justinian had decreed, that a general summons to appear before the judge, without mentioning any one of the things which the plaintiff might demand, should be deemed sufficient for all his claims, and should interrupt the prescription (*L. ult. C. de arth. excep.*); by the ordinance all demands ought to be by way of libel, and the citations are null if the cause of action is not therein explained. See the ordinance of 1667, tit. 2, art. 1. See the remark on the fifth article of the first section of *Interest*.

<sup>y</sup> *L. ult. C. de duobus reis.* See the following article, and the remark which is there made; the ninth article of the first section of *Solidity*, &c., and the fifth article of the second section of the same title.

possess houses and lands in common, the action entered against any one of them by the creditor of the said debt, or by the proprietor of the said houses or lands, will interrupt the prescription with regard to them all; for the demand was made for the whole right.<sup>a</sup>

## XVIII.

2234. *Force does not interrupt the Possession.* — He whose possession is interrupted only by an act of violence, without any form of law or justice, is nevertheless considered as possessor, because he has the right to enter again to his possession. Thus, the time of the usurper's possession does not interrupt his.<sup>a</sup>

<sup>a</sup> See the text cited on the preceding article. It is to be observed upon this and the foregoing article, that it is no matter although there be no solidity, either among the debtors of one and the same sum of money, or among the possessors of the same houses and lands, or among the creditors or proprietors, and that it is sufficient to interrupt the prescription with respect to them all by a demand made by any one, or against any one of them, that it be one and the same thing, or one and the same right which is common to them. Thus, for example, if the creditor of an inheritance demands his whole debt from one of many heirs of his debtor, he will interrupt the prescription with regard to them all, although each of them be indebted only for his portion. For this creditor may be ignorant of the number and right of the heirs; and although he should know it, yet he may demand the whole debt from any one of them. Thus, when one of the heirs or executors of a creditor demands from the debtor of the deceased what he owed him, he interrupts the prescription for his coheirs or coexecutors. For he makes his demand for the whole debt, and he has an interest that the whole debt be preserved entire.

<sup>a</sup> L. 17, D. de acq. vel amitt. poss.

## BOOK IV.

### OF THE CONSEQUENCES WHICH ANNUL OR DIMINISH ENGAGEMENTS.

2235. WE must not confine to the matter which shall be treated of in this book all the manners of annulling or diminishing engagements; for proofs, an oath, prescriptions, have this effect, and we must also reckon them in this number. But it was not here that we proposed to treat of them, and their proper place was in the foregoing book, for the reason that has been remarked in the plan of the matters; \* that proofs, an oath, and prescriptions, having these two opposite effects, both to fortify engagements and to annul or diminish them, it was natural, that, seeing they were to be treated of only in one place, they should be considered in the first place where it should be necessary to explain the rules thereof. Thus, we are to consider the rules of proofs, of an oath, and of prescriptions, as a matter common both to the third book and to this.

2236. *Three Ways of annulling or diminishing Engagements.*— There are three ways of annulling or diminishing an engagement. The first is, by executing and performing it; either the whole, as he does who pays a sum which he owes, or in part, if he pays only a part of the debt upon account. The second, by procuring the engagement to be declared null by a court of justice, either in the whole, as if it was money lent to a minor who had squandered it away upon his pleasures; or in part, if only one part of the money lent was employed to profitable uses. The third, by substituting a second engagement in the room of the first, so that there be only the second which subsists, the first being annulled.

\* See the fourteenth chapter of the *Treatise of Laws*, no. 12.

2237. *Order of the Titles of this Book.*— Payments, which we shall treat of in the first title of this book, are of the first of these three ways: and compensations, which are nothing else but mutual payments, and which shall be considered under the second title, are of the same nature. Rescissions of contracts, and restitutions of things to their first estate, which shall be the subject-matter of the last title, belong to the second of these ways of annulling engagements. And novations and delegations, which shall be explained in the third and fourth titles, are of the third sort.

2238. Cession of goods, which shall be the subject-matter of the fifth title, is a mixture of the first two of these three ways. For it discharges a part of the debts, and if it happens that the effects yielded up by a debtor be real estate which is sufficient to satisfy some of the creditors who have preferable mortgages, their debts are entirely acquitted and annulled; and the debts of the other creditors, whom the remainder of the said real estate is not sufficient to clear off, are diminished in proportion to what they receive. And if there be only movables, which are not sufficient to clear off all the creditors, the cession of goods will not acquit any one debt entirely, but diminish them all. For every creditor will come in for his proportion of the price of the movables; as shall be explained in the fifth title. And the cession of goods has likewise this effect, with regard to the creditors who might arrest the person of the debtor, that it annuls in this his engagement, and that after he has surrendered all his effects, he is no longer liable to this arrest.

2239. As the matters of the preceding book, where we have treated of all that can add to engagements, or strengthen and corroborate them, are common to all sorts of engagements, whether they have been formed by covenant or without covenant; so the matters of this fourth book are likewise common to all sorts of engagements of these two kinds.

## TITLE. I.

### OF PAYMENTS.

2240. ALTHOUGH we understand commonly by the word *payment* only that manner in which those who are indebted in sums

of money acquit themselves of their obligation, by paying money; yet we may give the name of payment in general to all the manners in which debtors acquit themselves of their obligations. For whatever frees the debtor from his obligation is instead of payment. And in this sense we may comprehend under the word *payment* compensations, novations, and delegations. But seeing these three manners of payment have peculiar characters which give them a nature quite different from that of simple payment, it has been thought proper to distinguish them under their proper titles: and in this title we shall only consider what concerns payments in general; what is their nature, their effects, the divers manners in which persons may acquit themselves of their obligations, who may make a payment or receive it; and in what manner payments are applied to the several debts; all which matters shall be treated of in the several sections of this title.

The reader may consult, upon the subject-matter of payments, the title *Of those who receive what is not due to them*, several rules whereof have relation to this matter.

## SECTION I.

### OF THE NATURE OF PAYMENTS, AND OF THEIR EFFECTS.

#### ARTICLE I.

2241. *Definition of Payments.* — Payments are the ways in which a debtor acquits himself of what he owed, or of a part of it.\*

#### II.

2242. *In what Manner the Debtor acquits himself.* — Whatever annuls the debt, or diminishes it, is in lieu of payment; whether it be that the debtor gives to the creditor money, or other things which he may owe him, or that he acquits himself of his obligation by satisfying him some other way, pursuant to the rules which shall be explained in the second section.<sup>b</sup>

#### III.

2243. *The Word "acquitting" is applicable to all Engagements.* — As we give the name of debt to every thing that is due, not only

\* *Liberationis verbum eandem vim habet quam solutionis.* L. 47, *D. de verb. signif.*

<sup>b</sup> L. 176, *D. de verb. signif.* See the second section.

from debtors of sums of money, or of things of another nature, but also from those who are obliged either to do some thing, as an undertaker of a work, or to restore a thing which is not theirs, as the depositary, and he who has borrowed a thing for use; <sup>c</sup> so likewise we consider as payments or acquittals all the manners in which one acquits or delivers himself from engagements of all kinds.<sup>d</sup>

## IV.

2244. *Payment of what was not due, or what one could not have been compelled to pay.* — The payment presupposing the debt, he who has paid through mistake that which was not due may recover it.<sup>e</sup> But if he has paid nothing but what was due in equity, although the debt had been such that he could not have been condemned in a court of justice to pay it, he cannot demand restitution of what he has paid.<sup>f</sup> Thus, for example, if a minor, being come of age, pays a sum of money which he had borrowed in his minority, upon an obligation against which he could have been relieved, he cannot revoke the payment which he has made. For by paying the money he has confirmed and ratified his obligation.<sup>g</sup>

## V.

2245. *One may pay before the Term.* — If the debtor who had a term fixed for payment has a mind to pay beforehand, the creditor cannot compel him to wait till the term. For all the time of the delay is given to the debtor, that he may acquit himself when he can.<sup>h</sup> And if he cannot do it sooner, he ought to do it at the term. But if he pays beforehand, he cannot take back what he has paid, for he owed it.<sup>i</sup>

<sup>c</sup> L. 1, D. de reb. cred.

<sup>d</sup> L. 176, D. de verb. signif.

<sup>e</sup> L. 1, § 1, D. de cond. ind.

<sup>f</sup> L. 10, D. de obl. et act. See, touching payments of that which is not due, the first section Of those who receive what is not due to them.

<sup>g</sup> L. 3, § 1, D. de minor. See the eleventh article of the first section Of those who receive what is not due to them.

This article is conceived in this manner, that he who pays that which was not due may recover it, and not that he who pays what he owed not may recover it. For if any one pays for another, although he was not obliged to do it, he cannot demand back what he has paid. See the second article of the third section.

<sup>h</sup> L. 70, D. de solut.

<sup>i</sup> See the second article of the first section Of those who receive what is not due to them.

## VI.

2246. *Effect of the Payment.* — The effect of payment is to annul the debt, if one pays the whole.<sup>1</sup> or to diminish it in proportion to what is paid.

## VII.

2247. *Payment made by another than the Debtor.* — If a payment is made for a debtor by another person than himself, he will nevertheless be acquitted from his obligation to the creditor, who has received his payment: and the debt, with regard to the said creditor, will be annulled, although the debtor knew nothing of the payment, and even although it had been made against his will; because the creditor was at liberty to receive what was due to him, and when he has received it, the debt is acquitted.<sup>m</sup>

## VIII.

2248. *The Payment frees the Sureties and Mortgages.* — The debt being annulled by the payment, the creditor has no longer any right upon the pawns and mortgages which he had for his security; and the bail and sureties are no longer obliged. For they were accessories to the obligation, which do not subsist after it is acquitted.<sup>n</sup>

## IX.

2249. *The Payment which one makes, that he may have an Assignment to the Debt, does not extinguish the Debt.* — Although the payment extinguishes the debt, yet if a creditor who has paid by another than his debtor assigns over his debt to him who pays him, the debt will subsist, and will pass from the person of the creditor to the assignee. For what is transacted between them is not a payment to discharge the debtor, but a sale which the creditor makes of his right to him who pays him. Which is to be understood of an assignment made either before, or at the time of payment. For if the payment had been made before the assignment, the debt being acquitted, the creditor could not make over a right which was no longer in being.<sup>o</sup>

<sup>1</sup> *Inst. quib. mod. toll. obl.*

<sup>m</sup> *Inst. quib. mod. toll. obl.*; — l. 53, *D. de solut.* This article supposes that a third person may pay for the debtor, as shall be explained in the second article of the third section.

<sup>n</sup> *L. 43, D. de solut.*

<sup>o</sup> *L. 76, D. de solut.*

## X.

2250. *The Sale of the Pawn does not acquit the Debt, except in so much as is raised by the Sale.* — If a creditor who had taken pawns for his security receives in payment the price of the pawn, sold either by order of the judge, or by the debtor, and the money raised by the sale of the pawns be not sufficient to acquit the whole debt, he will remain still creditor for the overplus, although the pawns should be worth more than the debt. For the personal obligation, to which the pledge was only an accessory, subsists still for what remains of the debt.<sup>p</sup> Unless it had been agreed, that the pawns should be instead of an entire payment, without any regard to the price which should be raised by the sale of them.

## XI.

2251. *Several Acquittals for several Debtors, by one single Payment.* — It often happens, that, by the effect of one single payment, many obligations of divers persons are acquitted; as when a debtor pays, by order of his creditor, to another person, to whom the said creditor was indebted; which might run into several payments from one creditor to another. But although there appear in such cases one single payment, yet there are in reality as many payments made as there are debts paid. For it is the same thing as if every one of those who are paid, and who pay to others by this one payment, did receive from the hands of his debtor that which is due to him, and deliver it into the hands of his creditor. And these payments, which are eclipsed in outward appearance, are true in effect.<sup>q</sup>

## XII.

2252. *Two Obligations of one and the same Debtor acquitted by one single Payment.* — It may also happen, that one and the same payment acquits at one instant two obligations of one and the same person to the same creditor; as, for example, if a testator who is creditor to a minor, who might get himself relieved from his obligation, leaves him a legacy upon this condition, that he shall pay the debt to his executor. For in this case, the payment

<sup>p</sup> L. 10, C. de obl. et act.

<sup>q</sup> L. 64, D. de solut.; — l. 3, § 12, D. de don. int. vir. et ux.



which the said legatee shall make will acquit his debt, and will satisfy the condition imposed for the legacy.\*

## XIII.

2253. *Effect of General or Particular Acquittances.* — Seeing a debtor may owe to one and the same creditor different debts for divers causes, and seeing he may either pay only some of them, or pay them all; one may comprehend in one and the same acquittance, either all the payments, if all the debts are paid, or a part of them. And the effect of such an acquittance is to annul either the debts only which are specified therein, or all that is due, if the acquittance is general, and conceived in terms which comprehend the whole.†

## XIV.

2254. *He who alleges a Payment ought to prove it.* — As he who pretends to be a creditor ought to establish his right, so he who acknowledges the debt, and alleges that he has paid it, ought to make proof of it.‡

## XV.

2255. *Payment of the Rents for Three Years last past proves the Payment of the former Years.* — The payment for three subsequent years of the arrears of quitrents, rents, and other annual duties, has this effect, that he who proves the payment for three years last past is discharged from the preceding years, although he should produce no acquittance for them. Unless it should be made appear by good proofs that the arrears of former years are still due, as if there were a promise to pay them, or a reservation of them in the latter acquittances. For it is just to presume, that the creditor would not have taken the three last payments without receiving either some acknowledgment of the old arrears remaining still due, or reserving them. And this presumption has its effect even with regard to the rents of the crown against those who are intrusted with the receipt of them.¶

\* L. 44, D. de solut.

† L. 6, D. de acceptil.; — l. 18, D. cod.; — l. ult. C. de acceptil.

‡ L. ult. C. de solut.

¶ L. 3, C. de apoch. public. But if it were a new farmer who had farmed some part of the king's revenue, and had received the first three years of his farm, his acquittances ought to be of no prejudice to his predecessor, who had the farm before him, as to the years which should remain due to him.

## XVI.

2256. *The Creditor is not obliged to divide his Payment.*—The creditor, having a right to demand the entire payment of his whole debt, is not obliged to divide it, and to receive such part of it as the debtor is willing to acquit.<sup>a</sup> But if the debtor had any ground to contest a part of the debt, and should offer to pay the remainder, it would be prudent for the judge, in this case, to oblige the creditor to receive what should be offered, pursuant to the rule explained in another place.<sup>b</sup>

## SECTION II.

## OF THE SEVERAL WAYS OF MAKING PAYMENT.

## ART. I.

2257. *Divers Manners of Payment.*—The most natural way of paying a debt is to pay the same thing in kind which one owes, as money for money, corn for corn. But in what other manner soever it happen that the creditor be satisfied, or ought to be satisfied, we consider as a payment every thing that is instead of it, and which extinguishes the debt.<sup>a</sup> Thus, for example, a compensation acquits on both sides that which is compensated, as shall be explained in the following title.

## II.

2258. *Delegation is a Payment.*—If a debtor delegates his debtor to his creditor, that is, if he substitutes in his place his debtor, who obliges himself to the creditor for the same thing, and in such a manner that the creditor is contented with this new debtor, and discharges the other, this delegation will acquit the first debtor.<sup>b</sup>

## III.

2259. *An Assignment of a Debt, without Warranty, in Order to be discharged, is a Payment.*—If a creditor accepts from his debtor an assignment of a debt, without warranty, and delivers

<sup>a</sup> L. 21, *D. de cred.* See the eighth article of the second section.

<sup>b</sup> See the fifth article of the second section of the *Loan of Money*.

<sup>c</sup> L. 52, *D. de solut.*; — l. 54, *cod.* See the second article of the first section.

<sup>d</sup> L. 8, § 3, *D. ad Vell.*; — l. 18, *D. de fidejuss.* See the title of *Delegations*.

up to the debtor his bond, or gives a discharge of it, this assignment will be instead of a payment, which will annul the debt, although it should happen that the creditor should recover no part thereof.<sup>e</sup>

## IV.

2260. *Novation is a Payment.*— If the creditor and debtor agree to innovate the debt, that is, if instead of the first obligation the debtor obliges himself by another of another nature; as if he who owed the price of a sale, or the rent of a house, gives a bond for it as for borrowed money, the creditor making no reservation of the first debt; the second obligation will be instead of a payment of the first, which by this novation will be acquitted and annulled.<sup>d</sup>

## V.

2261. *The Oath of the Debtor, when the Debt is referred to it, or a Sentence, is instead of Payment.*— The debtor to whose oath the debt has been referred, and who has sworn either that he owed nothing, or that he has paid the debt, is quit in the same manner as if he had actually paid it.<sup>e</sup> And if without making oath he is discharged by a decree, or sentence from which there lies no appeal, the sentence or decree will be instead of an acquittance.<sup>f</sup>

## VI.

2262. *If the Thing that is due perishes, the Debtor is acquitted.*— If the thing that was due chances to perish, without the fault of the debtor, the debt is acquitted. Thus, for example, if the thing sold perishes in the hands of the seller who was not in fault that it was not delivered, he is free from his obligation.<sup>g</sup> But this rule is not to be understood of those kinds of things which being lent are paid back in kind, and not in specie, such as money, corn, wine, and other things of the like nature. For those who borrow

<sup>e</sup> L. 52, D. de solut.

<sup>d</sup> L. 1, D. de novat. See the title of *Novations*. See the sixth article of the first section of the *Loan of Money*.

<sup>e</sup> L. 27, D. de jurejur.; — l. 40, eod. See the tenth and eleventh articles of the sixth section of *Profs.*

<sup>f</sup> L. 1, D. de re jud.

<sup>g</sup> L. 107, D. de sol.; — l. 33, D. de verb. obl.; — l. 23, eod.; — l. 5, D. de reb. cred. See the second article of the seventh section of the *Contract of Sale*.

things of this kind are not bound to restore the same individual thing which they have borrowed; but they are indebted for as much of the same kind.<sup>a</sup>

## VII.

2263. *If the Creditor succeeds to the Surety, or the Surety to the Creditor.* — If the creditor succeeds as heir to him who was surety for his debtor, or the surety succeeds to the creditor, the obligation of the surety is annulled; but the debtor, nevertheless, remains still obliged. For the surety's obligation, which is extinguished by this change, was only accessory to the principal obligation.<sup>1</sup> And if there were more debtors, or more creditors, for one and the same sum, and if one of the debtors should succeed to one of the creditors, or one of the creditors to one of the debtors, the confusion which would be made in the person of the said heir, being limited to one portion of the debt, would make no manner of change with respect to the others.

## VIII.

2264. *Consignment of the Debt, in Case the Creditor refuses his Payment.* — When a debtor, offering to pay all he owes, and in the place where he ought to pay it, the creditor refuses to receive it, it is lawful for the debtor to consign the money: and if the consignment is made according to form, it will be held as a payment of the debt, and will put a stop to the rent or interest, if it is a debt that bears interest.<sup>1</sup>

## IX.

2265. *One cannot pay one Thing for another.* — Payments ought to be made of that which is due, and the debtor cannot, against the will of his creditor, pay him another thing than what he owes, although the value of what he should offer to give were equal, or

<sup>a</sup> See the fourth article of the first section of the *Loan of Money*. If the debtor owed one of two things, and one of the two happens to perish, he will continue debtor of that which remains. Concerning which, see the seventh article of the seventh section of the *Contract of Sale*. V, l. 95, *D. de solut.*

<sup>1</sup> L. 42, *D. de solut.* See the eighth and ninth articles of the fifth section of *Cautions or Sureties*.

<sup>1</sup> L. 9, *C. de solut.*; — l. 19, *C. de usur.* Seeing the debtor is not permitted to consign the debt, unless it appear that the creditor has refused to receive payment of it, and seeing it may happen that the creditor may have some just cause to refuse it, the debtor cannot safely consign the debt, unless he does it by order of the court.

even should exceed, the value of the thing due. Thus, he who owes money cannot give in payment lands or houses, or debts, unless the creditor consent to it.<sup>m</sup>

## X.

2266. *A Work which ought to be made by the Hand of a certain Workman.* — Seeing undertakers and artisans are debtors for the works which they undertake to make, and that there are works of such a nature that it is of importance to have them made by the hand of the undertaker or workman himself who undertook them; those who are obliged to make with their own hand works of this nature cannot discharge themselves of their obligation by delivering the work of another person.<sup>n</sup>

## XI.

2267. *The Cession of Goods makes a Payment in another Thing than what was due.* — The debtors who are allowed to surrender their goods for the satisfaction of their creditors give in payment another thing than what they owe. And this is likewise another manner of payment, which shall be spoken of in its proper place.<sup>o</sup>

## XII.

2268. *If one gives in Payment of a Sum of Money another Thing than Money, it is a Sale.* — If a creditor of a sum of money should consent to take in payment houses, lands, or other thing, it would be a sale of which the sum that is due would make the price. Thus, the debtor would remain guarantee against all evictions, and he would be discharged from the debt only on condition of his warranting the possession of the thing to the creditor, and the pay-  
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<sup>m</sup> L. 2, § 1, in *f. D. de reb. cred.*; — l. 16, *C. de solut.*; — l. 17, *C. eod.* By the third chapter of the fourth Novel, the Emperor Justinian ordained, that debtors who owed sums of money, and had only lands or houses, for which they could find no purchasers, should be admitted to give in payment houses or lands at a reasonable valuation, with the warranty which they were able to give, leaving to their creditors the most valuable houses and lands which they had. This law was founded on a motive of humanity towards the debtors, and even on the interest of the creditors themselves, who could not hinder their debtors, when reduced to the last necessity, from being admitted to surrender their lands and houses for the payment of their creditors. But the difficulties and inconveniences that attended the execution of this law brought it soon into disuse; and it were to be wished that provision were made in this matter, as well as against the many abuses committed in the seizure and sale of the estates of debtors.

<sup>n</sup> L. 31, *D. de solut.* See the ninth article.

<sup>o</sup> See the title of the *Cession of Goods.*

ment would be altogether without effect, if the creditor should be evicted of the estate which he had received in payment,<sup>3</sup> unless it had been otherwise agreed between the parties. And as the diminutions which might happen to the thing given in payment would fall upon the creditor, so likewise he would reap the profit of all that might render the thing better or more valuable.<sup>4</sup>

## XIII.

2269. *If a Part of the Land given in Payment is evicted from the Creditor.* — If, in the case of the preceding article, the creditor having taken lands in payment, a part of them were evicted from him, he might oblige the debtor to take back the rest. For it might so happen that, because of the eviction of that part, the rest of the land might be a burden to him, and that he took the land in payment only that he might have it whole and entire.<sup>5</sup>

## XIV.

2270. *A Payment made in a Species of Money that is just going to be cried down.* — Payments of money ought to be made in species which are neither cried down nor suspected.<sup>6</sup> But if the creditor having delayed to receive his payment, the money should chance to be cried down before the debtor had actually made a tender of the money to his creditor, the loss which would be occasioned by crying down the species that remained still in the hands of the debtor would fall upon the debtor. For he was still master of them while they were in his hands.<sup>7</sup>

## SECTION III.

WHO MAY MAKE A PAYMENT, OR RECEIVE IT.

## ART. I.

2271. *Persons who are jointly bound for the same Debt, and Sureties, may pay for the Debtor.* — Persons who have interest that a debt be acquitted may pay it. Thus, those who are jointly bound together, each of them for the whole debt, may pay one for

<sup>3</sup> L. 46, D. de solut.; — v. l. 24, D. de pign. act.

<sup>4</sup> L. 46, D. de solut.

<sup>5</sup> L. 102, D. de solut.

<sup>6</sup> L. 24, C. de solut.

<sup>7</sup> L. 99, D. de solut.

the other: thus, sureties may acquit what they are bound to pay for others. And the payments which these persons make discharge the debtors for whose behoof they make them, and annul their obligation to the creditor. But the said debtors remain obliged to him who acquits their debt.<sup>a</sup>

## II.

• 2272. *Any Person may pay for another.*—Payment may be made, not only by a person who is interested with a debtor, but also by other persons who have no concern in the debt. And he for whom another has paid is acquitted, whether he knows or is ignorant of the payment, and even although he should not agree to it. For the creditor may receive that which is due to him: and he who pays for another may do that favor either to the creditor or to the debtor, or may have other just causes for doing it.<sup>b</sup>

<sup>a</sup> L. 16, *D. de acceptil.*; — l. 2, *C. de duob. reis.*

<sup>b</sup> L. 39, *D. de neg. gest.*; — l. 44, *D. de cond. indeb.*; — l. 23, *D. de solut.*; — l. 53, *eod.*; — l. 17, *C. eod.* Although it be permitted that one person may pay for another, yet this rule is to be understood of debts that are legally due, and of persons who acquit them with an honest and fair intention. For it is not allowed that one, under pretext of paying for another, should make payment of a debt which the debtor pretends he does not owe. And it is still less allowable to pay in order to purchase litigious rights, and to vex those who are pretended to be the debtors thereof. The Emperor Anastasius prohibited this commerce by a law, which is the 22d *Cod. de mand.* And seeing litigious rights are never assigned over to others, except for lesser sums than those which are pretended to be due, he ordained that the assignee should recover only the same sum which he had really and truly paid. But because many persons eluded these prohibitions, by making mixed conveyances, which consisted of a sale of one part for a certain price, and of a donation of the overplus, Justinian, by another law, which is the twenty-third of the same title, prohibited this mixture of sale and donation together, allowing those conveyances when they were made purely on the score of donation; and as for the others which should happen to be made for a certain price, he left the debtor at liberty to acquit them by paying only the real price which the purchaser had disbursed. But all these precautions not being sufficient to hinder persons from counterfeiting a donation instead of a sale, nor from mentioning in the conveyance a greater price than what was actually paid, it was no difficult matter to elude these laws. And besides, there are many occasions in which the assignments of controverted debts may be lawful. For besides the exceptions which this law of Anastasius makes of assignments among coheirs in relation to the rights of the succession, and of some other cases where they who accept of such assignments are thereby obliged for some lawful interest, it may happen, and it often does happen, that a debt is rendered litigious by an unjust opposition from the debtor. It may likewise so fall out, that a creditor of a lawful debt, although it be doubtful and controverted, may not have any other fund whereupon to subsist, or wherewithal to pay a creditor: and in these and other the like cases, the assignments of contested rights may not be altogether unjust. For which reason, the putting these laws of Anastasius and Justinian in execution ought to be left to the discretion of the judge, according to the quality of the facts, and the cir-

## III.

2273. *Of the Debtor who with the Money of another Person pays their Common Creditor his own Debt.*—If a debtor, having given his money to another person to pay the same for him to his creditor, the said third person, being indebted to the same creditor, gives him that money in payment of what he himself owes him; this payment would seem to be useless both for the one and the other of these debtors. For he who carried the money had no power to employ it in the discharge of his own debt: and he who gave it is not discharged by a payment that was not made for his account. Thus, whilst things remained entire, and the effect of the said fraud could be repaired, the payment would be rectified, and placed to the account of him who had given the money. But if the creditor, being ignorant of the knavery of him who carried the money, had delivered him up his bond, and had disposed of the money, there would remain nothing for him who gave the money except his action against the person who had undertaken to deliver it to the creditor. But if, on the contrary, in the same case, the creditor, who had delivered up the bond, had still the money in his hands, he could not keep it, no more than a thing that was stolen, which he would be obliged to restore to the owner.\* But he who had given the money could not oblige the creditor to re-

cumstances which may help him to judge whether the assignments be just or unjust, and whether they ought to have their entire effect, or if the debtor may be admitted to reimburse the person to whom the assignment is made of the sum which he has actually paid to the creditor, or even whether he who has accepted of the assignment ought not to be punished for it, if on his part there were any misdemeanour which might deserve it. It is because of these different effects of the assignments of litigious rights, that some authors have been of opinion that these laws are not at present observed in France, because they have seen that they have not been followed in many cases, which were excepted for particular reasons; whereas others are of opinion that they are still in force here, because in reality there are many cases where they are observed, and because it is just to restrain the commerce of assignments of litigious rights on all occasions wherever equity may seem to demand it. As to the assignments of litigious rights, the reader may consult the remarks at the end of the preamble to the eighth section of the *Contract of Sale*.

\* *L. 17, D. de solut.*; — *v. l. 94*; — *d. l. § 2*; — *v. § 6, et § ult. Inst. de obl. quæ ex del.* The obligation of this creditor to give back the money, if it is in being, or to place it to the account of the owner of the money, results from the terms of this law, which ordains, that, if the money is no more in being, the person who delivered it to the creditor be acquitted; from whence it follows, that it would be otherwise if the money were still extant in the hands of the creditor. For in this case the owner would claim them as a thing stolen; the laws reckoning in the number of thefts acts of such a quality as this of the bearer of the money, and giving to the master of the thing stolen the right of challenging it, in whose hands soever it is. *V. d. § 6 et § ult. Inst. de obl. quæ ex del.*; — *l. 54, D. de furt.*; — *d. l. § 1*.



store it, unless he procured the bond to be given back to the creditor, which he delivered up to the bearer of the money, that all things might be in the same state and condition they were in before the payment. For otherwise he who sent the money by another ought to impute to himself this consequence of his imprudent choice of the person. And there would remain nothing to him but his action against the person whom he had intrusted with the money. But the bearer of the money would be answerable to both the other persons for costs and damages, and be liable to the other penalties which his knavish dealing might deserve.

## IV.

2274. *The Attorney of a Person may make a Payment, and receive it.* — Those who are appointed agents or attorneys for others may equally make payments for debtors, and receive them for creditors, if they have a special power, or letter of attorney, empowering them so to do; or if they have a general letter of attorney, by which they are intrusted with the administration of all the affairs of any person: for their act and deed is the same as that of the persons who have given them the charge of their concerns.<sup>d</sup>

## V.

2275. *Payment to him who has not Power to give an Acquittance.* — If a debtor pays to him whom he believed to be the creditor's factor or attorney, and who was not so, the said payment will not acquit him.<sup>e</sup> But if the creditor who had given order to a person to receive the money for him revokes the said order, and the debtor, being ignorant of the revocation, pays the money to the said person, the payment will be good, and the debtor will be thereby discharged; as, on the contrary, the payment would not avail the debtor, if he had made it after he knew of the revocation.<sup>f</sup>

## VI.

2276. *Tutors and Curators may make and receive Payments.* — Tutors and curators may make and receive payments for persons who are under their charge.<sup>g</sup>

<sup>d</sup> L. 12, *D. de solut.* See the seventh article of the third section of *Proxies*.

<sup>e</sup> L. 34, § 4, *D. de solut.*; — l. 58, *cod.*

<sup>f</sup> L. 12, § 2, *cod.*; — l. 34, § 3, *cod.*

<sup>g</sup> L. 14, § 1, *D. de solut.*; — d. l. 14, § 7. See the fourth article of the second section of *Tutors*.

## VII.

2277. *Payment to one of more Creditors, each of whom has a Right to receive the Whole.* — If a thing is due to two or more creditors solidly, that is, in such a manner that every one of them has full and ample right to receive the whole, the payment that is made to one of them will discharge the debtor from all the others.<sup>b</sup>

## VIII.

2278. *One of many Heirs can receive only his own Portion.* — If there be no solidity among several creditors for one and the same thing, that is, if each of them has not a right to receive the whole thing, but only his portion of it, such as coheirs, none of them can receive the whole for the others, unless they all consent to it.<sup>1</sup>

## IX.

2279. *Payment made to one who lies under an Accusation of a Crime.* — Persons accused of crimes which are liable to be punished with confiscation of goods may, before their condemnation, receive what is due to them, and pay what they owe. For otherwise innocent persons, who chance to be accused, would be unjustly deprived of the use of their goods.<sup>1</sup> But this liberty of receiving and making payments ought to be understood in such a manner, as that there be no fraud to elude the confiscation of goods, and that the person who is accused give no acquittance without receiving real payment, and that he do not pay but what he lawfully owes.<sup>m</sup>

## SECTION IV.

## OF THE IMPUTATION OF PAYMENTS.

## ART. I.

2280. *The Debtor of several Debts acquits whichever of them he pleases.* — If a debtor who owes to a creditor different debts

<sup>b</sup> Ex pluribus reis stipulandi, si unus acceptum fecerit, liberatio contingit in solidum. L. 13, § ult. D. de acceptil. See the second section of *Solidity among two, &c.*

<sup>1</sup> This is a consequence of the preceding article. See the eleventh and twelfth articles of the first section of *Deposit*. V. l. 81, § 1, D. de solut.

<sup>1</sup> El. 41 et 42, D. de solut.

<sup>m</sup> V. l. 15, D. de depnat.

hath a mind to pay one of them, he is at liberty to acquit whichsoever of them he pleases, and the creditor cannot refuse to receive payment of it.<sup>a</sup> For there is not any one of them which the debtor may not acquit, although he pay nothing of all the other debts; provided he acquit entirely the debt which he offers to pay.<sup>b</sup>

## II.

2281. *Payments are applied to the Debts at the Choice of the Debtor, and in his Favor.* — If, in the same case of a debtor who owes several debts to one and the same creditor, the said debtor makes a payment to him, without declaring at the same time which of the debts he has a mind to discharge; whether it be that he gives him a sum of money indefinitely in part of payment of what he owes him, or that there be a compensation of debts agreed on between the creditor and debtor, or in some other manner; the debtor will have always the same liberty of applying the payment to whichsoever of the debts he has a mind to acquit. But if the creditor were to apply the payment, he could apply it only to that debt which he himself would discharge in the first place, in case he were the debtor. For equity requires that he should act in the affair of his debtor as he would do in his own. And if, for example, in the case of two debts, one of them were controverted and the other clear, the creditor could not apply the payment to the debt which is contested by the debtor.<sup>c</sup>

## III.

2282. *The Payment is applied to the Debt which it is most advantageous for the Debtor to acquit.* — In all the cases where a debtor owing several debts to one and the same creditor is found to have made several payments, of which the application has not been made by the mutual consent of the parties, and where it is necessary that it be regulated either by a court of justice, or by arbitrators; the payments ought to be applied to the debts which lie heaviest on the debtor, and which it concerns him most to discharge. Thus, a payment is applied rather to a debt of which the non-payment would expose the debtor to some penalty, and to costs and damages, or in the payment of which his honor might

<sup>a</sup> L. 1, D. de solut.

<sup>b</sup> L. 1, D. de solut.; — l. 3, eod.

<sup>c</sup> See the sixth article of the first section.

be concerned, than to a debt of which the non-payment would not be attended with such consequences. Thus, a payment is applied to the discharge of a debt for which a surety is bound, rather than to acquit what the debtor is singly bound for without giving any security; or to the discharge of what he owes in his own name, rather than of what he stands engaged for as surety for another. Thus, a payment is applied to a debt for which the debtor has given pawns and mortgages, rather than to a debt due by a simple bond or promise; rather to a debt of which the term is already come, than to one that is not yet due; or to an old debt, before a new one; and rather to a debt that is clear and liquid, than to one that is in dispute; or to a pure and simple debt, before one that is conditional.<sup>d</sup>

## IV.

2283. *The Overplus of a Payment, after the Discharge of one Debt, is to be applied to the others.* — When a payment made to a creditor to whom several debts are due exceeds the debt to which it ought to be applied, the overplus ought to be applied to the discharge of the debt which follows, according to the order explained in the preceding article, unless the debtor makes another choice.\*

## V.

2284. *A Payment is first applied to the Discharge of the Interest.* — If a debtor makes a payment to discharge debts which of their nature bear interest, such as that of a marriage portion, or what is due by virtue of a contract of sale, or the same be due by a sentence of a court of justice, and the payment be not sufficient to acquit both the principal and the interest due thereon; the payment will be applied, in the first place, to the discharge of the interest, and the overplus to the discharge of a part of the principal sum.<sup>f</sup>

## VI.

2285. *And that even although the Acquittance should mention both Principal and Interest.* — If in the cases of the foregoing arti-

<sup>d</sup> L. 3, § 1, et l. 4, D. de solut.; — l. 97, eod.; — l. 1, eod.; — l. 5, eod.

\* L. 97, in f. D. de solut.

<sup>f</sup> L. 5, § 2, in f. D. de solut.; — l. 48, eod.; — l. 5, § 21, D. ut in possess. legat. vel fideic. serv. caus. ess. lic.

cle the creditor had given an acquittance in general for principal and interest, the payment would not be applied in an equal proportion to the discharge of a part of the principal and of a part of the interest; but, in the first place, all the interest due would be cleared off, and the remainder would be applied to the discharge of the principal.<sup>s</sup>

## VII.

2286. *How the Price of what is pawned or mortgaged for several Debts is to be applied.* — When a debtor, obliging himself to a creditor for several causes at one and the same time, gives him pawns or mortgages, which he engages for the security of all the debts; the money which is raised by the sale of the pawns or mortgages will be applied in an equal proportion to the discharge of every one of the debts. But if the debts were contracted at divers times, upon the security of the same pawns and mortgages, so as that the debtor had mortgaged for the last debts what should remain of the pledge after payment of the first, the moneys arising from the pledges would in this case be applied, in the first place, to the discharge of the debt of the oldest standing.<sup>h</sup> And both in the one and the other case, if any interest be due on account of the debt which is to be discharged by the payment, the same will be paid before any part thereof be applied to the discharge of the principal.<sup>i</sup>

## • TITLE II. •

### OF COMPENSATIONS.

2287. *The Subject-Matter of this Title.* — It often happens that the same person is at the same time both creditor and debtor to another; as if an executor is charged with a legacy to a legatee who was his debtor; if two persons are reciprocally indebted to one another for money lent; if one has received and laid out money for another: and two persons may be mutually indebted to one

<sup>s</sup> L. 5, § ult. *D. de solut.*

<sup>h</sup> L. 96, § 3, *D. de solut.*

<sup>i</sup> L. 35, *D. de pign. act.* See the fifteenth article of the third section of *Pawns and Mortgages.*

another, so as that one of them alone may owe different debts, or likewise both of them. In these and other the like cases, which are infinite in number, it is natural not to make so many payments as there are debts, so as for one of the two to pay to the other what he owes him, and to receive back again that which is due to him; but such debts are compensated, that is, every one retains in payment of what is due to him that which he owes to the other, whether it be for the whole debt, if the sums are equal, or by deducting a lesser debt out of a greater. So that compensations are nothing else but two reciprocal payments, which are made at the same time, the debtors giving to one another no other thing but their bare acquittances, the debts being annulled for so much as shall be found to be acquitted by the compensation.

2288. *There are some Debts which are not to be compensated.* — Although it seems natural that every debtor who is on his part creditor to the person to whom he is indebted may compensate, yet the use of compensation is not extended indifferently to all sorts of debts. For there are some debts which the debtors are bound to acquit to those who are in other respects indebted to them, without insisting on compensation, as shall be shown in the second section.

## SECTION I.

OF THE NATURE OF COMPENSATIONS, AND OF THEIR EFFECT.

### ART. I.

2289. *Definition of Compensation.* — Compensation is a reciprocal acquittal of debts between two persons who are indebted the one to the other.

### II.

2290. *Compensation prevents the Circuit of two Payments.* — The use of compensation is necessary to avoid the circuit of two payments, which would happen if each of the two persons who compensate should be obliged first to pay what he owes, and then to receive back again what is due to himself. And it is natural, without fetching this compass, for every one to retain in payment

of what is due to him that which he owes on his part. Thus, every compensation implies two payments.<sup>b</sup>

### III.

2291. *It takes place, although the Debts to be compensated be not equal in Quantity.*— Although the reciprocal debts be not equal so as to compensate the whole, yet, nevertheless, the compensation takes place in a smaller debt against the greater, so that the greatest debt is thereby acquitted for so much as the least debt amounts to.<sup>c</sup>

### IV.

2292. *Compensation hath its Effect of itself, and by Virtue of the Law.*— Compensation being natural, it has of itself, and by virtue of the law, its effect, although the persons who have right to compensate do not think of it, and even although both the one and the other should be ignorant of the debts they have to compensate. For each of them being at the same time both creditor and debtor to the other, these qualities are in equity and in truth confounded together, and annulled. Which hath this effect, that if, for example, two heirs of two inheritances, the goods and effects whereof were not yet fully known to them, should be found in this quality of heir to be reciprocally indebted to one another, the one for a sum bearing interest, and the other for a sum bearing no interest; the interest would cease to run, either in the whole, if the debts were equal, or to the amount of the lesser debt, and that from the day that the last debt should appear to be due.<sup>d</sup>

### V.

2293. *The Account ought to be stated Year by Year, that the Compensations be made at the Time that the Sums become due.*— It follows from the preceding rule, that between persons who are reciprocally indebted to one another, as between a tutor and his minor, between coheirs, copartners, and others, if there be sums owing which bear interest, the accounts and computations ought to be stated year by year, and in such a manner that the compensations and deductions be made at the times that the sums to be

<sup>b</sup> L. 3, D. de compens.; — l. 2, eod.; — l. 4, in f. D. qui potior.

<sup>c</sup> § 30, Inst. de action.; — l. 4, C. de compens.

<sup>d</sup> L. 21, D. de compens.; — l. ult. C. eod.; — l. 4, C. eod.; — l. 7, C. de solut.; — l. 11, D. de compens.

compensated fall due, that the interest may run, or cease to run, according to the changes which the compensations and deductions may make therein.\*

## VI.

2294. *The Judge may compensate by Virtue of his Office.* — Seeing compensation is made by the authority of the law, it is in the power of the judge, and it is likewise his duty, in the cases where there are mutual demands between parties, to compensate of his own free motion the reciprocal debts in which compensation may take place; whether it be that the compensation have the effect to acquit totally the parties, or that, after the compensation is made, one of the parties ought to be condemned to pay some overplus to the other.†

## SECTION II.

AMONG WHAT PERSONS COMPENSATION TAKES PLACE, AND IN WHAT DEBTS.

## ART. I.

2295. *One compensates only in his own Right.* — Compensation can only be made between persons who have in their own names the double quality of creditor and debtor: and if a debtor exercises against his creditor a right which is not his own, as a tutor does who demands a debt due to his minor, or an attorney who sues the debtor of the person who has given him a power so to do, there will be no compensation made of what the said tutor or attorney may owe in their own names to the said debtors.‡

## II.

2296. *To compensate, it is necessary that the Debts be Clear and Liquid.* — It is not enough to make a compensation, that there be a debt on the one side and the other, but it is, moreover, necessary that both the debts be clear and liquid, that is, certain, and not liable to dispute. Thus, one cannot compensate with a clear and liquid debt a debt that is litigious, nor a pretension that is not

\* L. 4, C. de compens.; — l. 7, C. de solut.

† L. 23, D. de compens.

‡ § 30, Inst. de action.



settled. But it depends on the prudence of the judge, to discern which debt is clear and liquid, and which is not. And as he ought not to defer giving sentence for a debt that is clear and evident, because of a demand of a compensation which would require a long discussion, and that such demand ought to be reserved to be judged afterwards, so neither ought he to refuse a short delay for such a discussion, if it can be done easily, and in a short time.<sup>b</sup>

### III.

2297. *And that there be no Exception to annul the Debt.* — We must reckon among the debts which do not enter into compensation those which, although clear and evident in themselves, may be annulled by some exception which the debtor may have against them.<sup>c</sup> Thus, he who is indebted to a minor cannot compensate what the said minor owes him by virtue of an obligation against which he may be relieved.

### IV.

2298. *Debts which are not as yet become due cannot be compensated.* — The debts of which the term of payment is not yet come are not compensated with those which are due without any term, or of which the term is already come.<sup>d</sup> And conditional debts, the effect whereof depends on the event of a condition, cannot be compensated till after the condition has happened.

### V.

2299. *There is no Compensation against Debts of Public Taxes.* — Those who are indebted on account of the public taxes, such as the land-tax, excise, customs, and other subsidies, cannot compensate with these sorts of charges that which, the prince may owe them on other accounts. For the nature and use of these contributions is such, that nothing can retard the payment of them. And much less can they compensate that which may be due to them from the persons who are employed in collecting the taxes. Thus, a private person who is assessed to the land-tax cannot compensate the sum at which he is assessed with what may be owing to him by the collector. Thus, a receiver of the land-tax cannot compensate with the public moneys which he has received that which the receiver-general may be indebted to him. But the

<sup>b</sup> L. ult. C. de compens.

<sup>c</sup> L. 14, D. de compens.

<sup>d</sup> L. 7, D. de compens.

other debts which are not privileged, and which one owes to the exchequer, may be compensated with what the exchequer owes to the same person. Thus, for example, if in an estate fallen to the crown by confiscation, by default of heirs, or by the death of an alien, there be some of the effects consisting in debts, the debtors whereof are found to be likewise creditors to the person to whom the estate did belong, compensation of those debts will be allowed.<sup>a</sup>

## VI.

2300. *There is no Compensation in a Thing deposited or lent.* — The depositary of a thing, and he who has borrowed a thing for use, cannot compensate what they have by virtue of any of these titles with a debt which the master of the thing deposited or lent may owe to them. And if two persons had reciprocally things belonging to another deposited in their hands, there would be no compensation between them in this case, but each of them would be obliged to restore the thing which had been deposited in his hands.<sup>f</sup>

## VII.

2301. *Compensation in Crimes and Offences, in what Respect it takes Place, and what not.* — In crimes and offences one does not compensate either the accusations or the punishments.<sup>g</sup> But when the matter relates only to costs and damages, or to the civil interest of the party, if the person accused be found to be a creditor of the accuser's, he may compensate.<sup>h</sup>

## VIII.

2302. *If Compensation is made of Two Debts, equal in the Sums, but unequal in other Respects.* — If one compensates two debts, which, although equal in the sums, are distinguished by some difference which may be estimated, the same may be considered in making the compensation. Thus, for example, if he who was to pay a sum of money in a certain place, where it was the creditor's interest to have it paid, compensates it in another place, and is by that means freed from the charges it would have cost to have

<sup>a</sup> L. 3, C. de compens.; — l. 20, D. eod.; — l. 46, § 5, D. de jure fisci.

<sup>f</sup> L. ult. in § C. de compens.; — l. 11, C. de pos.; — l. ult. C. de commod.; — v. l. 18, § ult. D. commod. See the last article of the third section of *Deposit*, and the thirteenth article of the first section of the *Loan of Things to be restored in Specie*.

<sup>g</sup> L. 2, § 4, D. ad leg. Jul. de adul.

<sup>h</sup> L. 10, § 2, D. de compens.

remitted the money to the place where it was to have been paid in making the compensation the value of the said remittance may be estimated.<sup>1</sup>

## IX.

2303. *One can compensate only that which may be given in Payment.* — Since compensations are payments,<sup>1</sup> and we cannot pay one thing for another against the will of the creditor;<sup>2</sup> so neither can we compensate any thing but what may be given in payment. Thus, an heir or executor, who had been charged by the testator to give certain lands to a legatee, could not oblige him to compensate with the said lands a sum of money which the said legatee might happen to owe him. Thus, he who should owe a ground-rent that could not be redeemed could not extinguish it by a compensation of a sum of money which the creditor of the ground-rent might be indebted to him. But he could only compensate the arrears of the said rent that should be due.

## TITLE III.

## OF NOVATIONS.

2304. *The Subject-Matter of this Title.* — It has been remarked in the preamble of this book, that we may annul or diminish engagements, by substituting a second engagement in the place of a former; so as that there be only the second engagement which subsists, the former being annulled. And this may happen two ways: one, without any change of the persons, by changing only the nature of the obligation; and the other, by a change of the debtor; whether it be that the first obligation subsists, the second debtor charging himself therewith instead of the former, who is discharged from it, or that the new debtor makes a new obligation. Thus, for an example of the first of these two ways, if an executor who is charged with a legacy agrees with the legatee to give him a bond as for money lent, amounting to the

<sup>1</sup> L. 15, D. de compens.

<sup>2</sup> L. 4, in f. D. qui pot. See the second article of the first section.

<sup>3</sup> L. 2, § 1, in f. D. de reb. cred. See the ninth article of the second section of Payments.

same sum with that which has been bequeathed to him, without making any mention of the legacy in the bond, and the said legatee gives the executor an acquittance for the legacy; in this transaction there will be no change of the persons, but only a change in the nature of the engagement, an obligation for money lent being substituted in the place of a legacy due by a testament. And it is this first way which we call novation, and which shall be the subject-matter of this title. Thus, for an example of the second way, by the change of the person of the debtor, if he who is indebted for money lent substitutes in his place another debtor, who obliges himself for the same sum to the creditor, so that the first debtor is discharged, the first engagement will be annulled in regard of the first debtor, who will be no longer bound for the money, and he who is substituted will become debtor in the place of the other. And it is this second way which is called delegation, whether the new debtor take upon him to acquit the first obligation, which is suffered to remain in force, or whether the first obligation is suppressed, and the new debtor obliges himself by some other title; but always in such a manner that the engagement of the first debtor is annulled by that of the new debtor, who succeeds in his place, and this shall be the subject-matter of the following title.\*

## SECTION I.

### OF THE NATURE OF NOVATION, AND OF ITS EFFECT.

#### ART. I.

2305. *Definition of Novation.*—Novation is the change which the creditor and debtor make, who in the place of one debt substitute another; so that the first obligation subsists no longer, and the debtor remains obliged only by the second.\* Thus, for example, if after a contract of sale, the price not being yet paid, the seller takes a bond from the buyer as for money lent, for the same sum which the price of the sale amounts to, so as that the contract of sale be discharged, and no reservation made thereof in the new obligation, the seller will have novated his debt.

\* [This method of annulling prior engagements, by substituting new ones in their room, is in the ancient books of the common law of England described by the same name of novation Bracton, lib 3, cap 2, no 13, — Fleta, lib 2, cap 60]

\* L 1, D de novat et deleg.

## II.

2306. *Novation is not presumed, if it do not appear.*— There is never any novation produced by the bare effect of a second obligation, unless it appear that the creditor and debtor have had an intention to extinguish the first. For otherwise both obligations will subsist.<sup>b</sup>

## III.

2307. *The Alterations made in a former Obligation do not innovate it.*— If the creditor and debtor agree to make some changes in a former obligation, whether it be by adding to it a mortgage, a surety, or some other security, or by taking the same away; whether it be by augmenting or diminishing the debt, or by fixing a longer or shorter term of payment, or by making the debt conditional if it was pure and simple, or pure and simple if it was conditional; all these changes, and others of the like nature, do not make any novation, because they do not extinguish the first debt, unless it were expressly said that it should be null. And the first obligation subsists, although it be not particularly mentioned that it is reserved, or that the said changes are made without an intention to innovate.<sup>c</sup>

## IV.

2308. *Novation of several Debts into one.*— One may innovate several debts by reducing them into one single debt, which may comprehend and extinguish all the others.<sup>d</sup> Thus, he to whom several debts are due for several causes may reduce to one sum all that is due to him, and take one single bond for the same as for money lent, which bond may comprehend all the other debts, and annul them.

## V.

2309. *The Novation annuls the Mortgages, and other Accessories of the Obligation.*— Seeing the effect of novation is to annul the former obligation, the mortgages, the sureties, and the other accessories of the first obligation, do not subsist any longer; and the interest, if the said obligation carried any, ceases to run.<sup>e</sup>

<sup>b</sup> *L. 2, in f. D. de nov. et deleg.; — l. ult. C. cod.* See the following article.

<sup>c</sup> *L. ult. C. de novat. et deleg.; — l. 6, D. cod.*

<sup>d</sup> *L. ult. § 2, D. de novat. et deleg.*

<sup>e</sup> *L. 1, D. de novat.* See the first article. *L. 18, cod.*

## SECTION II.

WHAT PERSONS HAVE POWER TO MAKE NOVATIONS, AND OF WHAT DEBTS.

## ART. I.

2310. *Who may innovate.*—All persons who are capable of contracting may innovate both what they owe, and what is owing to them. And those who cannot oblige themselves; such as prodigals who are interdicted, cannot make any novation, unless thereby they better their condition.<sup>a</sup>

## II.

2311. *A Tutor may innovate for the Advantage of his Minor.*—Tutors and curators may make novations for those who are under their charge, provided it be for their advantage.<sup>b</sup>

## III.

2312. *An Attorney may innovate, if he has a Warrant so to do.*—Attorneys who have a special power to innovate, or who have a general letter of attorney empowering them to take care of all the goods and all the affairs of the person who constitutes them, may innovate for the said person.<sup>c</sup>

## IV.

2313. *Any one of the Creditors, who has Power to receive Payment, may innovate.*—If two persons are creditors for the same debt solidly, that is, in such a manner that each of them alone has a right to demand it, and to discharge the debtor, any one of them may innovate the debt.<sup>d</sup>

## V.

2314. *Novation by another Person than the Debtor.*—As a third person who is noways interested with the debtor may pay for him, so likewise he may innovate his debt without him, he oblig-

<sup>a</sup> L. 3, D. de novat. et deleg.

<sup>b</sup> L. 20, § 1, D. de novat. et deleg.; —7. ult. § 1, cod.

<sup>c</sup> L. 30, D. de novat.; —d. l. § 1.

<sup>d</sup> L. 31, § 1, D. de novat. et deleg. See the seventh article of the third section of Payments, and the second section of the Solidity among two, &c.

ing himself in the debtor's place to the creditor, with an intention to innovate the said debt, and to annul it.<sup>a</sup>

## VI.

**2315. *All Debts whatsoever may be innovated.***—All sorts of debts whatsoever, without distinction, may be innovated, in the same manner as they may be extinguished by other ways which acquit or annul them. Thus, one may innovate a debt which was subject to restitution or rescission, a legacy, a debt due by a transaction, or by a sentence of condemnation in a court of justice, and any other debt, from what cause soever it may proceed.<sup>b</sup> And the novation subsists, although the new debt may not subsist; as if it were liable to be vacated, or that the debt subsisting it should prove to be useless, the new debtor being insolvent. For these events would not make the first obligation to revive, which was extinguished by the novation.<sup>c</sup>

## TITLE IV.

### OF DELEGATIONS.

**2316. *The Subject-Matter of this Title.***—The nature of novations and delegations, with the difference that is between them, has been explained in the preamble of the foregoing title. And it has been there observed, that delegation may be made in two manners. For one may delegate so as that the obligation of him who delegates or appoints another debtor in his place is annulled, and does not any longer subsist; as if it was a bond which was cancelled, the new debtor binding himself by another obligation, either of the same nature, or of a different kind. And one may likewise so delegate as that the first obligation still subsisting, the first debtor is discharged from it, and there remains no other debtor besides the person who is delegated. And in both these manners of delegation, it is always certain that the obligation of

<sup>a</sup> L. 8, § 1, *D. de novat.*; — d. l. 8, *inf.* See the second article of the third section of *Payments*.

<sup>b</sup> L. 1, § 1, *D. de novat.*; — l. 8, § 1, *cod.*

<sup>c</sup> See the first article of the first section.

the first debtor is annulled, since he remains no longer bound, and the delegation, making a new debtor, makes likewise for this reason a new obligation. We make here this remark, because although this distinction of the two manners of delegation be not expressly and precisely marked in the texts which are quoted upon the articles of this title, yet it is a natural consequence of what they contain of the nature and effects of delegation.

2317. It follows from these remarks on the nature of novation, and that of delegation, that all delegations imply a novation, since in the place of a former obligation a new one is substituted. But every novation does not imply a delegation, seeing the debtor may innovate his first obligation by a new one, in which he may oblige himself alone, without substituting any other new debtor in his stead.

## ART. I.

2318. *Definition of Delegation.* — Delegation is the change of one debtor for another, when he who is indebted substitutes a third person who obliges himself in his stead to the creditor; so that the first debtor is acquitted, and his obligation extinguished, and the creditor contents himself with the obligation of the second debtor.\*

## II.

2319. *Delegation requires the Consent of all Parties concerned.* — There is this difference between novation and delegation, that whereas a third person may innovate the debt of the debtor without his consent,<sup>b</sup> delegation is not made but by the consent both of the debtor who delegates another in his place, of the person who is delegated, and of the creditor who accepts the delegation, and who contents himself with the new debtor.<sup>c</sup>

## III.

2320. *Difference between Assignment of a Debt and Delegation.* — We must not confound delegation with the assignment which

\* [What is here explained under the title of delegation is by the ancient authors who treat of the law of England comprehended under the general name of novation. *Bracton*, lib. 2, cap. 2, no. 13; — *Fleta*, lib. 2, cap. 60.]

<sup>a</sup> L. 11, *D. de novat. et deleg.*; — l. 3, § 3, *D. ad Velleian.*; — l. 26, § 2, *D. mand.* See the seventh article.

<sup>b</sup> See the fifth article of the second section of *Novations.*

<sup>c</sup> L. 1, *C. de novat. et deleg.*



a debtor makes to his creditor of what is owing to him by another person. For whereas delegation implies the will of him who obliges himself in the place of another, and acquits the first debtor, the assignment of a debt is, as it were, a sale of what is owing by a third person, which may be made without his consent, and it may be agreed that he who makes the assignment shall remain obliged as before.<sup>d</sup>

## IV.

2321. *Another Difference.* — There is, moreover, this difference between the assignment of a debt and delegation, that he who makes an assignment may receive the debt which he has assigned, if intimation thereof has not been made to the person who owes the debt that is assigned; and the knavish dealing of him who receives what he had made over to another person does not hinder the debtor who has paid him from being discharged from the debt. But after the delegation, the person who is delegated in the place of another cannot acquit his obligation but by paying the debt to the creditor who has accepted it.<sup>e</sup>

## V.

2322. *Neither the Assignment of a Debt, nor the Obligation of a Third Person for the Debtor, makes a Delegation.* — If a debtor makes over to his creditor that which a third person owes to him, or if the said third person becomes bound for the said debtor to his creditor, so as that both in the one and the other case the first debtor remains obliged, it will be neither a delegation nor a novation; but an additional security which this debtor, who remains still obliged himself, will give to his creditor, the first obligation still subsisting.<sup>f</sup>

## VI.

2323. *Delegation to the Creditor, or to another by his Order.* — The creditor to whom his debtor delegates another debtor in his place may either accept the delegation himself in his own name, or give his order that it be accepted by another person. And in this second case, the delegation makes a change both of the debtor and of the creditor.<sup>g</sup>

<sup>d</sup> L. 1, C. de novat. et deleg.

<sup>e</sup> L. ult. C. de novat. et deleg.

<sup>g</sup> L. 3, C. de novat. et deleg.

<sup>f</sup> L. 11, D. de novat. et deleg.

## VII.

2324. *Delegation is a Kind of Novation.* — Delegation is a kind of novation; for the first obligation of the person who delegates is extinguished by the obligation of him who is delegated.<sup>b</sup>

## VIII.

2325. *The Person delegated cannot revive the Former Obligation.* — He who is delegated by the debtor, being obliged himself to the creditor, cannot revive the first obligation, which is annulled by the delegation, nor mortgage the estate which the first debtor had engaged. And the creditor on his part has no longer any recourse against the person who has delegated, although the new debtor should become insolvent, or even although he had been insolvent at the time of the delegation. For one does not any more consider the origin of the first debt, but only the second, which has annulled the first. Which is to be understood of the case of a true delegation which has innovated the debt.<sup>1</sup>

## IX.

2326. *The Person delegated cannot make Use of the Exceptions which he had against him who delegated him.* — In the same case of a true delegation which has innovated the debt, if the person who is delegated had just exceptions against the first debtor which he had not reserved, he cannot make use of them against the creditor, even although his exceptions should be grounded on some fraud of the person who has delegated him. For the first obligation subsisting no longer, the second derives its nature from what is transacted in the delegation between the person delegated and the creditor, whose interest is altogether independent on what had preceded between his debtor and the person who is delegated. Thus, for example, if he who is delegated was indebted to the person who delegated him only on the account of a donation which he had made him, the person delegated cannot make use of the exceptions which donors have against the donees, such as the right of revoking the donation because of the ingratitude of the donee, or of having some favor and indulgence in the payment of a sum which was given as a mere bounty. Thus, for another example, if the person delegated was indebted to him who dele-

<sup>b</sup> L. 2, C. de novat. et deleg.; — l. 3, eod. See the first article.

<sup>1</sup> L. 30, D. de novat. et deleg.; — l. 3, in f. C. eod.; — l. 26, § 2, in f. D. mand.

gated him, by virtue of an obligation against which he might have been relieved, having granted it during his minority for money which he borrowed and squandered away idly, he could have no relief against the creditor, if at the time of the delegation he was of age.<sup>1</sup>

## TITLE V.

### OF THE CESSION OF GOODS, AND OF DISCOMFITURE.

2327. *Connection between these two Matters.*—The *cession of goods* and *discomfiture* are two consequences of the insolvency of debtors, whose goods and effects are not sufficient to pay their creditors. And it is because of this connection between these two matters, that they are here placed under one and the same title. We shall find in the first section what relates to the cession of goods, and the matter of discomfiture shall be treated of in the second section.

## SECTION I.

### OF THE CESSION OF GOODS.

2328. *The Subject-Matter of this Section.*—The cession of goods, which shall be treated of in this section, is a benefit which the laws have granted to debtors, that they may deliver their bodies from imprisonment, by surrendering and yielding up all their goods and effects to their creditors. It is to be remarked, touching this matter, that whereas in the Roman law the cession of goods might be made, not only in a court of justice, but also in private, either by the debtor himself, or by some other person having authority from him; the ordinances of France have prohibited the receiving the cession of goods otherwise than by the debtor in person, before the judge, in open court, with the formal-

<sup>1</sup> L. 19, *D. de novat. et deleg.*; — l. 33, *cod.* See the sixth article of the second section of *Donations*, and the second article of the third section of the same title.

<sup>2</sup> L. ult. *D. de cess. bon.*

ties which they have prescribed,<sup>b</sup> that the cession of goods may be attended with shame and confusion, in order to restrain the too great facility and frequency of them. And although it might seem reasonable to exempt from this disgrace those who are reduced to make a cession of their goods by reason of losses happened to them without their fault, which ought to distinguish their condition from that of debtors who are reduced to that state by their own knavery or bad conduct;<sup>c</sup> yet the ordinance has not made this distinction, that there might be no gap left open for the encouragement of persons to make a cession of their goods.

2329. Besides the benefit of the cession of goods, the laws of France have granted to debtors that of respites or delays of one year, or of five years, which the ordinances empower the judges to grant to debtors, upon a judicial inquiry into the reasons they have to offer for desiring the same, the creditors being called to make their exceptions against it.<sup>d</sup>

2330. The respites in the Roman law depended on the creditors themselves, who had it in their choice either to oblige the debtor to make cession of his estate, or to grant him a delay of five years. And it was by the plurality of voices among the creditors that this choice was regulated, reckoning the plurality not by the number of the creditors, but by the strength and force of their credits; so that one single creditor, whose credit was more than that of all the others, was master of this choice.<sup>e</sup> And the debtor was obliged to give security, in order to obtain a delay.<sup>f</sup>

2331. All debtors are not received alike to make cession of their goods, nor to have the benefit of a respite; but there are many causes which may hinder their obtaining these favors, as well on the part of the debtor who is found to be unworthy of them, as on the part of the creditor to whom this prejudice cannot be done, either because of the privilege of his debt, or for other causes. Thus, they do not allow the benefit of a cession of goods to one who owes a civil interest adjudged for a crime: thus, a farmer who has enjoyed the fruits of his farm is not allowed this benefit:

<sup>b</sup> The debtor in person, while the court is sitting, without a sword, and bareheaded. Ordinance of 1510, art. 70, and that of 1490, art. 34.

<sup>c</sup> *Novel* 435, in *præfatione*.

<sup>d</sup> Ordinance of Orleans, art. 61.

<sup>e</sup> *L. 8, D. de pactis*; — *old l. ult. Cod. qui bon. ced. poss.*

<sup>f</sup> *V. l. 4, C. de præcib. imp. off.*

thus, the cession of goods does not take place against a creditor who is possessed of a pledge, and does not deprive him of the security he has on the thing which the debtor had parted with for his advantage. Thus, the customs in several parts of France have differently regulated many cases in which the respite, or delay, does not take place; as in a deposit, in a debt adjudged by a sentence after hearing both parties, for rents of houses, or of farms, pensions, costs taxed, a sale in the public market, a sale of lands or houses, alimony, medicines, funeral charges, the wife's marriage portion demanded by the husband, or the wife's jointure demanded by the widow, arrears of rents, which some customs restrain to ground-rents, salaries and wages of servants and day-laborers, debts owing to poor persons who cannot conveniently lie out of their money, debts due to minors, contracted during their minority, moneys remaining in the hands of persons who have been intrusted with the administration of goods belonging to the church, or to the public, or who have been tutors or curators, upon the balance of their respective accounts.

2332. All these several cases are those which the customs of France have specified, although not any one of them comprehends them all. And one may perceive this to be common to them all, that the cession of goods, and the respite, are refused, either because the debtor has rendered himself unworthy of this benefit, as in the case of debts arising from crimes and offences, in a deposit, and in some others: or because of the privilege of the debt, as in debts of alimony, and servants' wages: or by reason of the quality of the creditor, as in debts owing to minors, and to poor persons who cannot wait for their money.

2333. It may be easily judged from these different causes which exclude debtors from the benefit of the cession of goods, and of the respite, that there may be several other cases to which the same principles may be applied, according to the quality of the credit, the knavery of the debtor, and the consequences thereof with respect to the public interest. And seeing the greatest part of these rules which except certain debts from the benefit of the cession of goods, and from that of respite, are observed in all the customs of France, although they do not all make mention of them, and that several of them say nothing of any one of them, and also that almost all these rules are observed in the provinces which are governed by the written law, which is the Roman law; one may in all places apply the rules of equity which distinguish

between the cases wherein the cession of goods and the respite may take place, and those in which it would not be just or reasonable to allow that benefit. Thus, one may apply them in the cases where the fraud of the debtor may deserve it, although the said cases should be different from those mentioned in the customs. We thought it convenient to explain in this place the particular causes which exclude debtors from the benefit of the cession of goods, and of respite, because, the same being explained nowhere but in the customs of France, it would not have been proper to set them down as rules in the articles of this section.

2334. It remains only that we remark on the cession of goods, that not only it does not take place in bankruptcies in France, but that by the ordinances fraudulent bankrupts are punished exemplarily, and even with death, and those who partake in their fraud are also punished as their accomplices.<sup>a</sup>

#### ART. I.

2335. *Definition of the Cession of Goods.* — The cession of goods is the surrender which the debtor makes of all his estate to his creditors, that he may either get out of prison, or avoid being cast into it.<sup>a</sup>

#### II.

2336. *The Cession of Goods does not wholly discharge the Debtor.* — The cession of goods acquits the debtor only for so much as the value of the goods which he delivers up amounts to, and does not exempt him from remaining still debtor for the overplus.<sup>b</sup>

#### III.

2337. *The Cession comprehends the Rights fallen to the Debtor.* — The goods which the debtor was not yet in possession of when he made the cession of his goods to his creditors, but to which he had then actually acquired the right, such as an inheritance which he had not as yet entered upon, are comprehended in the cession: and the creditors may exercise upon the said goods the rights of the debtor.<sup>c</sup>

<sup>a</sup> Ordinance of Orleans, art. 143; of Blois, art. 205, of Henry IV., in the year 1609.

<sup>b</sup> L. 1, C. qui bon. ced. poss.; — l. ult. loc.

<sup>c</sup> L. 1, C. qui bon. ced. poss.

<sup>d</sup> Nov. 135, c. 1.

## IV.

2338. *Of Goods which the Debtor acquires after the Cession.*

— The goods which the debtor may chance to acquire after the cession will be subject to his creditors for what shall remain still unpaid of their debts; but the creditors cannot throw the debtor into prison for the debts contracted before the cession, nor strip him so of his new acquisitions as not to leave him any thing for his subsistence. And one ought to leave him whereupon to subsist, especially if what he has newly acquired has been given him for that end, and that it yields him no more than what is barely necessary for his food and raiment.<sup>d</sup>

## V.

2339. *The Debtor ought to make the Cession of his Goods upon Oath.* — The debtor who is received to make a cession of his goods ought to declare upon oath that he makes it without any fraudulent intent, and that he does not conceal any part of his estate to the prejudice of his creditors.<sup>e</sup>

## VI.

2340. *The Cession of Goods does not immediately strip the Debtor of the Property of them.* — The cession of goods does not immediately divest the person who makes it of the property of the goods which he gives up to his creditors. But if, before the goods are sold, he finds himself in a condition either to pay his creditors, or to produce sufficient exceptions against their claims, he may take back his goods. This is not to be understood of him who, without making this cession of goods, had given his goods in payment to his creditors.<sup>f</sup>

## VII.

2341. *The Cession is not received unless the Debtor own the Debt.* — To be received to make a cession of goods, it is necessary that the person own himself to be debtor.<sup>g</sup>

<sup>d</sup> L. 7, in f. *G. qui bon. cedere poss.*; — l. 7, *D. de cess. bon.*; — l. 3, *C. de bon. aut. jud. poss.*; — l. 4, *D. de cess. bon.*; — l. 6, *cod.*

<sup>e</sup> Nouv. 135, c. 11. This oath ought to contain, that there has been no fraudulent alienation of the goods, and that the declaration which the debtor makes of his goods is true. It is after this manner that this oath is explained by some of the customs of France, which require also that the debtor shall promise upon oath, that, if ever he happens to be in better circumstances, he will faithfully pay his debts.

<sup>f</sup> L. 3, *D. de cess. bon.*; — l. 3, *cod.*; — l. 4, *C. qui bon. ced. poss.*

<sup>g</sup> L. 8, *D. de cess. bon.*

## VIII.

2342. *The Cession does not discharge the Sureties.* — The cession of goods does not discharge the sureties of him who has made it.<sup>1</sup>

## IX.

2343. *The Cession made to some of the Creditors takes place with regard to all.* — If the debtor hath made a cession of his goods to some of his creditors, it hath its effect with regard to the others. For it is to all the creditors that the goods of him who makes the cession are given up.<sup>1</sup>

## SECTION II.

## OF DISCOMFITURE, OR THE INSOLVENCY OF DEBTORS.

2344. *The Subject-Matter of this Section.* — To understand aright this matter of discomfiture, or insolvency, it is necessary to distinguish three sorts of creditors: those who have a privilege; those who have no privilege, but have a mortgage; and those who have neither privilege nor mortgage. Among the creditors who are privileged, and who have mortgages, the goods of the debtor are distributed according to the order which they have either by the preference of their privileges, or priority of their mortgages, pursuant to the rules which have been explained in the title of *Pawns and Mortgages*, and of the *Privileges of Creditors*. And as to the creditors who have neither privilege nor mortgage, there being no preference nor priority among them, the goods of the debtor are for that reason distributed among them in proportion to the sums due to them; that is, that the condition of the creditors being equal, every one of them has his portion of the goods of the debtor, according to the quantity of his claim: and if, for example, all the debts amount to the double of what is to be distributed, each creditor will receive only the half of the sum that is due to him. And this is what is called Contribution, which happens in two manners, either when the goods are of such a nature that they are not capable of being mortgaged, such as movables in France, or when the creditors

<sup>1</sup> L. 60 D. de fideijuss.; — l. 21. § 3, in f. cod.

<sup>1</sup> L. 4. § 1. D. de res. bon.



have neither privilege nor mortgage on the immovables. For in that case, if the goods of the debtor are not sufficient to satisfy all the creditors, they come in ratably for a proportionable share of the goods as far as they will go towards the discharge of the debts: and in France we give the name of *discomfiture* to this effect of the insolvency of the debtor, which makes his goods, on which the creditors have neither mortgage nor privilege, to be distributed after this manner.\*

### ART. I.

2345. *Definition of Discomfiture.* — Discomfiture is the condition in which a debtor is, when his estate is not sufficient to pay all his debts, and when he has goods of which the price ought to be distributed among the creditors ratably, without any privilege and without any mortgage; so as that each creditor may have his share of the goods, in proportion to the sum that is due to him.\*

### II.

2346. *The Creditor who is possessed of a Pledge is preferred as to that Pledge.* — In the case of discomfiture or insolvency, the creditor who is in possession of a pledge, which the debtor had given him for his security, is preferred upon that pledge before the other creditors.<sup>b</sup>

### III.

2347. *As also the Seller, on the Thing sold.* — The seller who has sold a thing, and lies still out of the money which he was to have for it, if he finds the thing that he sold in the hands of the buyer, may seize on it, and he is not obliged to share it with the other creditors of the buyer. And it would be the same thing,

\* [It may not be amiss to observe here the difference between discomfiture and bankruptcy. The former takes in all sorts of debtors whatsoever, whether they be merchants or others, whose affairs are so discomfited and disordered that they have not enough left to pay their creditors. Whereas the word *bankruptcy* relates only to such persons as use the trade of merchandise, or seek to get their living by buying and selling, who prove insolvent, and again it whom a commission of bankruptcy does issue.]

<sup>a</sup> L. 5, § ult. *D. de tribut. act.* See what has been said in the preamble.

<sup>b</sup> L. 5, § 8, *D. de tribut. act.* We must not extend this rule to the case of a creditor who attaches the movables of his debtor, if the *discomfiture* happens during the attachment; for in this case, the first who attaches is not preferred before the others. And it is expressly so regulated by some customs in France.

may, and with much more reason, if the owner of the thing had given it to the debtor to sell for him.<sup>a</sup>

## IV.

2348. *The Case of a Conditional Debt.* — If, among the creditors who come in ratably for a share of the goods of a debtor in the case of discomfiture or insolvency, there should be found any one whose debt depended on the event of a condition, or which ought not to be paid till a long time after, it would be necessary either to leave so much of the goods as would come to this creditor's share, or that the other creditors who should receive the same should bind themselves, and give security if it should be found necessary, to pay back their several proportions of this creditor's share after the condition should happen, or the term of payment come.<sup>a</sup>

## TITLE VI.

## OF THE RESCISSION OF CONTRACTS, AND RESTITUTION OF THINGS TO THEIR FIRST ESTATE.

2349. *Difference between the Subject-Matter of this Title and the Matters treated of, in the other Titles of this Book.* — There is this difference between all the other manners of annulling or diminishing engagements which have been explained in this book, and these which are the subject of this title, that all the others put an end to engagements without calling their validity in question, whereas rescissions and restitutions of things to their first estate respect the validity of the engagements, and make them

<sup>a</sup> L. 5, § 18, D. de tribul. act. But if the thing sold be not any more in the possession of the buyer, will the seller have the preference before the creditors of a third person who shall have purchased it from the buyer? There are some customs in France where they make a distinction between the condition of a seller who has sold without any day or term of payment, expecting ready money for his goods, and the condition of the seller who has given time for payment, and they give a preference in the first case, but not in the second. To which we may apply the words of the text cited upon this article: — Si in creditum abii, si non abii. See the remark on the fourth article of the fifth section of *Phons and Mortgages*.

<sup>a</sup> L. 7, D. de tribu. got.

either wholly void, or make such changes in them as may seem just and equitable. Thus, when a minor is relieved against an obligation which he had contracted in his minority, this obligation is annulled either in the whole, if none of the money for which it was contracted was laid out to the advantage of the minor, or for so much of the money as has not been usefully employed, and he pays no part thereof. Thus, when a major is relieved against a contract extorted by force, his engagement is annulled.

2350. These words of *rescission* and *restitution* signify in reality only the same thing, to wit, the benefit which the laws grant to those who complain of some fraud, some error, some surprise in acts or deeds to which they have been parties, that they may be restored to the same condition in which they were before the execution of the said acts or deeds.

2351. Although it may seem that the word *restitution* is particularly applicable to persons who because of some quality are relieved from their engagements; such as minors, and married women who have bound themselves without the authority of their husbands, or even with their authority, in the provinces where they cannot bind themselves at all; and that the word *rescission* belongs properly to the act or deed which is repealed and annulled because of some vice therein, as if it is an obligation which has been extorted by force; or which one has been drawn into by some error, or by some surprise, which is sufficient to annul it; yet this distinction between restitutions and rescissions does not hinder them from being often confounded together, because both the one and the other tend to annul the act or deed that is liable to be rescinded. And therefore, in this title, we shall use both these words in one and the same sense.

2352. We must not confound the matter of rescissions and restitutions with that which has been treated of under the title of the *Vices of Covenants*. For although the vices of covenants be so many causes of rescission, and that there is no cause of rescission which is not comprehended in what has been said concerning the vices of covenants, yet there is this difference between the subject-matter of this title and that of the title of the *Vices of Covenants*; that in that title there is explained only the nature of those vices, and their effects, and that although something has been hinted at there, of their giving occasion to the repealing or

<sup>a</sup> See the preamble to the title of the *Vices of Covenants*.

annulling of covenants, yet the rules of rescissions and restitutions are not explained in that title; but in this we are to explain the said rules, such as those which respect in general the nature of rescissions, their effects, their consequences, and those which particularly relate to the different kinds of rescissions; the cases in which they take place; the restitutions of minors, and the other rules of the like nature.

. 2353. All these sorts of rules, which are to be the subject-matter of this title, may be reduced under three heads, which comprehend them all, and we shall divide them into as many sections. The first shall contain the rules which are common to all sorts of rescissions and restitutions; the second shall take in those which respect the restitutions of minors; and the third shall comprehend the rules which have relation to the restitution of majors, in the cases where they may have just cause to sue for the repeal of their contracts.

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## SECTION I.

### OF RESCISSIONS AND RESTITUTIONS IN GENERAL.

2354. It is necessary to observe, touching this matter of rescissions and restitutions in general, that, according to our usage in France, the ways of nullity do not take place, that is to say, that one cannot procure an act or deed to be annulled, to which he has been a party, by barely alleging the grounds and reasons which render it null; but it is necessary to procure letters from the prince, in order to obtain a rescission of the deed, and restitution of things to their first estate.

2355. It is likewise proper to take notice here, that all rescissions, and restitutions, upon what ground soever they be built, whether it be fraud, violence, damage in more than the half of the true value, or any other ground whatsoever, prescribe in ten years, reckoning from the day of the act or deed which is complained of, or from the time that the violence, or other cause which may have hindered the party from bringing his action, shall have ceased. And with respect to minors, the restitution prescribes in ten years, counting from the day of their majority; and after thirty-five years complete, the age of majority in France being

twenty-five, one is not admitted to sue for restitution.<sup>a</sup> We have made here this remark, because the time of rescission was shorter in the Roman law;<sup>b</sup> for which reason we have not set down the precise time in the thirteenth article of this section, where mention is made of the time of rescissions and restitutions.

## ART. I.

*2356. Definition of Rescission and Restitution.*—The rescission of a contract, or restitution of things to their first estate, is a benefit which the laws give to him who has been aggrieved by some act or deed to which he was a party, that he may be put in the same condition he was in before the said act or deed, if there be any just cause for it.<sup>a</sup>

## II.

*2357. The Deed may be annulled, although the Party be not guilty of any Fraud.*—It is not always necessary for obtaining the rescission of an act, or restitution of things to their first condition, that the party who demands it should prove that it is by the fraud of his adversary that he has been deceived; but it sufficeth, in many cases, that there be in it some grievance of another nature, provided it be such as that it ought to have this effect.<sup>b</sup> Thus, for example, if a minor has borrowed money which he has foolishly and idly squandered away, the upright and honest intention of his creditor will not hinder the restitution.<sup>c</sup> Thus, a major who is wronged in a partition will procure the same to be redressed, although the person who is concerned with him in the partition cannot be charged with any fraud.<sup>d</sup>

## III.

*2358. Restitution against Sentences or Decrees.*—One may procure to be rescinded or annulled, not only covenants, or other acts which one has made voluntarily, but even sentences or decrees of a court of justice to which they have been parties, if there

<sup>a</sup> See the ordinance of 1510, art. 46; that of 1535, ch. 8, art. 30; that of 1539, art. 134.

<sup>b</sup> *V. l. ult. C. de tempor. in int. restit.*

<sup>c</sup> *L. 1, D. de in int. rest.; —l. 3, eod.* We have explained in the preamble to this title the difference there may be between restitution and rescission of contracts.

<sup>d</sup> *L. 36, D. de reb. obl.* See the fifth article of the sixth section of *Covenants*, and the fourth article of the third section of the *Views of Covenants*.

<sup>e</sup> See the second article of the second section.

<sup>f</sup> See the third article of the third section.

be just cause for it; as if he who complains be a minor who was not defended in the suit, or even, although he be major, if he can show that his adversary has been guilty of some fraud, or offers any other reason which the law approves of.\*

## IV.

2359. *Rescissions depend on the Prudence of the Judge.* — Rescissions being founded upon facts and circumstances, as if the party has been guilty of some fraud, if any force has been used against him who prays to be relieved, if he has been drawn in by some error or some surprise, or if there be any other cause assigned which may be sufficient to obtain a rescission; the same is not decreed till after a judicial hearing of the cause. And it depends on the prudence of the judge to discern if the reasons which are alleged be sufficient, and if it be equitable to decree the act or contract to be rescinded.†

## V.

2360. *They ought not to be granted easily.* — Among the circumstances which are to be weighed in the grant of a rescission, one ought to consider of what moment the thing in dispute is, and what will be the consequences of the rescission if it is granted. For it ought not to be easily granted under the circumstances, where the damage to be repaired is inconsiderable, and where the rescission which is prayed on account of the said damage might be attended with consequences which would amount to some injustice.‡

## VI.]

2361. *Effect of the Rescission against Third Persons.* — When there is ground for granting a rescission, the same hath its effect, not only against the persons whose act has given occasion to it, but likewise against those who represent them, and against third possessors. Thus, for example, if he who has purchased an estate of a minor sells it to a third person, the restitution of the minor

\* L. 7, § 1, D. de in int. rest.; — l. 7, § 4, D. de min.; — d. l. § ult. This is the foundation of the use of civil requests, even for majors. The grounds of a civil request are explained in the ordinances. See the ordinance of 1667, in the title of *Civil Requests*, art. 24, 25, 26.

† L. 1, D. de in integ. rest.; — l. 3, cod.; — l. 7, cod.

‡ L. 4. D. de in int. rest.

will take place against the said third person, and against every other possessor, and the purchaser will have his remedy only against his seller. Thus, a proprietor who is stripped of his estate by a sale or other contract, to which he was constrained to give his consent by some violence, may bring his action against any possessor whatsoever of the said estate, and he will recover it from him, although that third possessor had no hand in the violence.<sup>h</sup>

## VII.

2362. *The Heir may be relieved in Right of the Deceased.* — The heirs of those who had a right to be relieved against any act or contract may sue to have the same rescinded.<sup>i</sup> For although the action seems to belong only to the person who has been wronged, yet the right of demanding reparation of the loss he has sustained in his goods will pass to his heir. And even father, who is heir to his son who was a minor, may demand restitution in the right of his son.<sup>j</sup>

## VIII.

2363. *A Special Proxy is necessary for the demanding a Rescission.* — The rescission cannot be demanded by a proxy or attorney, although he should produce a general letter of attorney; but he must have a special power or proxy to authorize him to make a demand of this nature.<sup>m</sup> For the silence of the person who might complain of an act or deed is an approbation thereof; and it is reasonable to presume, that, seeing he does not expressly signify his desire to be relieved, he is willing to abide by what has been done.

## IX.

2364. *The Party's Ratification of the Act hinders the Rescission of it.* — If the cause of the restitution having ceased, he who might have been relieved has ratified the act or deed which he had ground to complain of, he will not afterwards be admitted to

<sup>h</sup> L. 18, § 1, D. de minor. See the twenty-seventh article of the second section. L. 14, § 3, D. quod iustus sit. See the sixth article of the second section of the Vices of Covenants.

<sup>i</sup> L. 6, D. de in integ. rest.; — l. 18, § ult. D. de min.

<sup>j</sup> L. 3, § 9, eod. See the fifteenth article.

<sup>m</sup> L. 25, § 1, D. de min.

sue for the rescission thereof; for the approbation makes a new act which confirms the former. Thus, for example, if a minor, being come of age, ratifies an obligation against which he might have been relieved, he cannot afterwards sue for relief.<sup>a</sup> Thus, he who, being at full liberty, ratifies an act which he pretended he was forced to consent to, cannot any more complain of it.

## X.

2365. *Reciprocal Effects of the Rescission.* — If the rescission or restitution is decreed, things are restored, on the part of him who is relieved, to the same condition in which they would have been if the act or deed which is annulled had never been made. But as he enters again to the possession of his rights, and recovers what ought to be restored to him, either in principal, or interest and fruits, if there be ground for it; so ought he likewise on his part to give back to his adverse party what profit he has reaped thereby, so that he may draw no other advantage from the rescission besides the bare effect of entering again to his rights, his adversary being likewise restored on his part to his rights, as far as the effect of the rescission will permit. Thus, the seller who procures a contract of sale to be vacated, of which he had received the price, ought to give back the said price. But if a minor is relieved against a sale which he had made, or against the grant of an annuity which he had made for borrowed money; he shall restore of the price of the sale, and of the money he has borrowed, only so much as shall be found to have turned to his benefit, by a useful application thereof. Thus, the rescission is reciprocal or not, according to the justice that may be due to him who is relieved.<sup>b</sup>

## XI.

2366. *Limits of the Rescission, if there be Matters in the Act or Deed which it has no Relation to.* — If, in the act or deed of which the rescission is demanded, there were other matters besides those which he who sues for relief may have ground to complain of, and if they have no connection one with another, the rescission would be limited to that which may give occasion for it, and

<sup>a</sup> L. 2. C. si maj. fact. rat. habuer.; — l. 30, D. de min. See the twenty-third article of the second section.

<sup>b</sup> L. un. C. de reput. quæ f. in jud. in int. res.; — l. 24, § 4, D. de minor.; — d l un § 2, C. de reput. quæ f. in jud. in int. res.



would not be extended to the other matters contained in the said act or deed. But if there were any connection between the different parts of the said act or deed, the effect of the rescission would reach them all, whether it were in favor of him who should demand it, or for the interest of the adverse party, in every thing that ought to be restored to its former state and condition.<sup>p</sup>

## XII.

2367. *Rescission of one Part, which hath its Effect for the Whole.*

— If a tutor had sold an estate belonging in common to him and his minor, and the said minor should get himself relieved from the said bargain, the purchaser might oblige the tutor who sold him the estate to take back his portion of it, for this reason, that he would not be bound to divide the effect of the contract, and to keep one part of the estate, which he would not have bought without the rest.<sup>q</sup>

## XIII.

2368. *The Time for demanding a Rescission.* — Rescissions and restitutions ought to be demanded within the time prescribed by law; and when that is expired, no demand of this kind is received.<sup>r</sup>

## XIV.

2369. *When this Time begins to run.* — The time of this prescription begins to run from the day that the cause of the rescission has ceased. Thus, it begins against minors from the day of their attaining majority; and against majors, from the day that they shall have been at liberty to enter their action.<sup>s</sup>

## XV.

2370. *How the Time is computed with Respect to Heirs and Executors.* — This time of prescription is reckoned, with respect to heirs and executors who demand the restitution, in such a manner as to join the time which had run against the person to whom they succeed to that which has run against themselves. But if

<sup>p</sup> L. 29, § 1, *D. de minor.*

<sup>q</sup> L. 43, § 1, *D. de ma.*

<sup>r</sup> V. l. ult. *C. de temp. in int. restit.* We do not set down here the words of this law; for the time for commencing actions of rescission and restitution is otherwise regulated by the ordinances. See what has been said of this matter in the preamble to this section.

<sup>s</sup> L. ult. *C. de temp. in int. restit.* See the preamble to this section.

the heir were a minor, his time would not begin to be added to that of the deceased, till after the day of his majority. For he would be relieved even against that, in that he had neglected to demand restitution during his minority.<sup>1</sup>

## SECTION II.

### OF THE RESTITUTION OF MINORS.

2371. Nobody is ignorant who the persons are who are called minors, and wherein they are distinguished from those who are called majors. As to which the reader may consult what has been said of this matter in the sixteenth article of the first section of the title of *Persons*, and in the ninth article of the second section of the same title.

#### ART. I.

2372. *The Cause of the Restitution of Minors.* — The restitution of minors is founded on the weakness of their age, and on the instability of their conduct, for want of experience and knowledge in business. And seeing this condition exposes them, not only to be imposed upon by others, but likewise to be mistaken often in their own interest, the law gives them relief against all acts and deeds by which their minority may have engaged them in some damage.

#### II.

2373. *The Restitution is independent of the Honesty or Knavery of the Party.* — It follows from the preceding rule, that, the restitution of minors being founded on their weakness, and on their want of experience and knowledge in affairs, the same is altogether independent on the honesty or knavery of those with whom they have treated. And whether it be that they themselves have been mistaken, or that the persons with whom they have had to do have overreached them, the restitution is equally granted to them, with the effect which it ought to have. Thus, the law protects minors, both against their own proper act and deed, and also

<sup>1</sup> L. 19, § 1, *D. de minor.*

<sup>2</sup> L. 1, *D. de minor.*

against that of persons who would take advantage of their easiness and weakness.<sup>b</sup>

### III.

2374. *The Minor is not relieved in all Cases without Distinction.*

— It follows also, from the same rule explained in the first article, that, minors being relieved only when they are actually wronged through their weakness of age and easiness of temper, they are not indifferently restored against all the acts or deeds which they may complain of. But, it is by the circumstances of their own conduct, of that of the parties with whom they have to do, of the quality of the act of which they complain, of the causes and consequences of the damage, and other the like circumstances, that we are to examine if it be just that they should be relieved, or not. For the intention of the law is, not to exclude them from the use of all affairs, and of all commerce, but only to prevent their deceiving themselves, or being deceived by others.<sup>c</sup> Thus, they are relieved, or not, according to the rules which follow.

### IV.

2375. *He is not relieved against what has been done for Just and Reasonable Causes.* — If a minor, who prays to be relieved, does not allege something that may be imputed either to his own bad conduct, or to some surprise from his adverse party, and if he has done nothing but what his interest or some duty obliged him to do; as if he has borrowed money to pay a just debt, which he discharged therewith, or if he has bought things necessary, even although they may have changed to perish by some accident, he could not be relieved.<sup>d</sup> Thus, a minor will not be restored against him who by his order had furnished alimony to the minor's father or mother in their necessity, according as his condition and estate might allow of it, seeing the minor might be constrained by law to maintain his parents according to his ability.<sup>e</sup> Thus, a minor, who had forgiven an injury which he might have complained of to a court of justice, will have no relief in this matter, nor be allowed to sue afterwards for a reparation of the said injury.<sup>f</sup>

<sup>b</sup> L. 44, *D. de min.*; — L. 5, *C. de j. integ. rest. min.*; — L. 4, in *f. D. de serv. export.*

<sup>c</sup> L. 1, § 1, *D. de minor.*; — L. 4, *ead.*; — L. 11, § 3, *ead.*; — L. 24, § 1, *ead.*

<sup>d</sup> L. 11, § 4, *D. de min.*; — L. ult. *C. de in int. test. min.*

<sup>e</sup> L. 5, *C. de patr. potest.*; — v. l. 5, *D. de agnos. et al. lib.*; — d. l. § 2. See the fourth article of the fifth section of Tutors.

<sup>f</sup> L. 37, *D. de minor.*

## V.

2376. *The Minor is not relieved, when he cheats, or does any Harm.* — The minor who shall have cheated any one, or done some damage, will not be relieved on the score of his minority, so as to be discharged from repairing the damage he has done. Thus, a minor who damnifies a thing which he has borrowed, or which has been deposited with him, will not be restored so as to be acquitted of the damage which he shall have caused.<sup>s</sup>

## VI.

2377. *Nor when he is guilty of any Crime or Offence.* — In crimes and offences the minority may give occasion to mitigate the punishments, but it does not hinder the minor from being condemned to make reparation of the damage which he has done.<sup>b</sup>

## VII.

2378. *If a Minor gives it out that he is of Age.* — If a minor has given out that he is of age, and by producing a false certificate of the registry of his christening, or by some other way, has made people believe that he is a major, he cannot be relieved against those acts into which he shall have engaged any one by this surprise. Thus, a minor having borrowed money by such means, although he has made no good use of it, yet his obligation will nevertheless have the same effect as that of a major.<sup>1</sup>

## VIII.

2379. *Minors are relieved from all Manner of Damage, except in the Cases of the preceding Articles.* — Seeing minors are not relieved indifferently in all cases, but according as the quality of the facts, and the circumstances may give occasion thereto, and since we have seen in the foregoing articles the rules which relate to the cases in which restitution is not granted; we shall next see, in the articles which follow, how it takes place, whether the minors have been deceived by the act of others, or by the weakness of

<sup>s</sup> L. 9, § 2, *D. de minor.*; — l. 2, *C. si min. ac maj. dix.*; — § 3, *D. ad Velleian.*

<sup>b</sup> L. 37, § 1, *D. de minor.*; — d. l. 37, in fine; — l. 1, *C. si adv. delict.*; — l. 8, *C. si min. ac maj. dix.*

<sup>1</sup> L. 2, *C. si min. ac maj. dix.*; — l. 3, eod.; — l. 32, *D. de minor.* This rule is to be understood only of the cases where the creditor has had some just reason to believe that the minor was of age. For if there was no more than a bare declaration of the minor's, who pretended to be of age, the creditor ought to blame himself for his credulity. And therefore we have conceived the rule in these terms.

their own judgments. For the integrity of the person who treats with a minor does not hinder the restitution: but he ought to blamie himself for not taking the precaution to inform himself of the condition of the person with whom he treated, and if he knew him to be under age, for treating with him in any other manner than to his advantage.<sup>1</sup>

## IX.

2380. *The Minor is relieved against all Sorts of Acts or Deeds in which he is injured.*—The restitution of minors is extended to all sorts of acts and deeds without distinction. Thus, they are relieved, not only when they are engaged to other persons, as by a loan, by a sale, by a partnership, or by other sorts of covenants, if they have been wronged in them; but also when other persons engage themselves to them, if the obligation made for their advantage was not such as it ought to be, either for the thing itself that was due, or for the security of the debt. Thus, they are restored against other acts as well as covenants; and they procure sentences or decrees of courts of justice, to which they have been parties, to be reversed, if their interest has not been sufficiently defended. Thus, they are relieved, if they have innovated a debt so as to make their condition worse than it was, or if they have given an acquittance for a payment which was not made to their guardian, but to themselves, whether it be that they did not actually receive the money, or that, having received it, they have squandered it away foolishly. Thus, a minor who had the choice, either as creditor or as debtor, to take or to give any one of two things, will be relieved if he has made a bad choice. And, in general, minors are restored against every thing which they may have done or suffered, or omitted to do, from whence any prejudice may have happened to them.<sup>m</sup>

## X.

2381. *He is relieved if he has accepted an Inheritance or Legacy that is burdensome, or refused one that is profitable.*—If a minor has renounced an inheritance which might have been profitable to

<sup>1</sup> L. 5, C. de integ. rest. min. See the third and seventeenth articles. L. 19, D. de reg. jur.

<sup>m</sup> L. 7, § 1, D. de minor.;—d. l. § 1;—d. l. 7, § 4;—l. 1, D. si adv. rem. jud.;—l. 27, § 2, cod.;—d. l. 27, § 6;—d. l. 7, § 7. See, concerning loan, the seventeenth article of this section.

him, he will be allowed to retract his renunciation, and to accept the inheritance.<sup>a</sup> And if, on the contrary, he has accepted a succession that is burdensome, he may be relieved from it, and allowed to renounce it,<sup>b</sup> the creditors being called that he may deliver up into their hands the goods belonging to the succession.<sup>c</sup> And he may likewise be relieved against the renunciation of a legacy,<sup>d</sup> which would have been profitable to him, or against his acceptance of one, if it was burdensome by reason of some charge, or some disadvantageous condition.

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2882. *If the Succession is profitable when the Minor enters to it, but becomes afterwards burdensome by some Accident.* — If, after that a minor has accepted an inheritance that is profitable, it happens that the goods are diminished by some accident, as if a house that is part of the succession perishes by fire, if some of the lands or tenements are carried off by an inundation, or if there happen other losses of the like nature, the minor, having done in that case nothing but what every other person would and ought to have done, he cannot have relief therein, so as to recover and receive back from the creditors to the said succession that which he had paid them.<sup>e</sup>

<sup>a</sup> L. 1, D. *sicut om. hered.*

<sup>b</sup> L. 7, § 5, D. *de minor.*; — l. 57, § 1, D. *de acq. vel om. hered.* See the two following articles.

<sup>c</sup> V. Nov. 119, c. 6.

<sup>d</sup> L. 7, § 7, D. *de minor.*

<sup>e</sup> L. 11, § 5, D. *de min.* We have not put down in this article, that the minor who has accepted a succession of which the goods are perishable may for this reason be relieved from it; for tutors are obliged by the ordinances to sell these sorts of goods, as has been said in the thirteenth article of the third section of *Tutors*. And besides, when a minor accepts a succession, provision is made both for his security and that of the creditors to the succession, by the inventory, which the tutor is obliged to make of the goods belonging to the succession. For by the effect of this inventory the minor is always in a condition to do justice to the creditors of the succession, and if afterwards it becomes burdensome by losses of goods of the kind mentioned in this article, it is but just that his condition should be the same with that of an heir or executor who has the benefit of an inventory, and who is never bound beyond the value of the goods of the inheritance, seeing the inventory puts the minor and the creditors in the same condition. But if, the minor or his tutor having employed the movable effects of the succession for discharging a part of the debts, and having paid the rest of the debts with the minor's own money, that the immovable goods of the inheritance might be preserved entire to him; it should happen afterwards that the said immovables should be lost by fire, by inundations, or by other events; this loss, which might happen to the most prudent persons, would not give a right to the minor to demand back from the creditors that which he had given them in

## XII.

2383. *If the Succession which the Minor has renounced is cleared and disentangled by another Heir.* — If a minor having renounced a succession, he who succeeds in his place as heir, whether by a substitution or as being next of kin, accepts of the inheritance, and the minor, repenting afterwards of his having renounced, is desirous to retract his renunciation, and to accept the succession; he will be relieved while things are still entire. But if the succession, being encumbered with affairs and with debts, had been cleared and disentangled by the care of this other heir, who had sold goods to pay off the debts, and had ended all the affairs, the minor could not be relieved, under these circumstances, to deprive the said heir of the fruit of his labors.\*

## XIII.

2384. *The Restitution takes place, for the Profits of which the Minor has been deprived.* — Minors are relieved, not only when they suffer loss, but also when they are deprived of some profit which they ought to have had.† Thus, for example, if a minor that is heir to a person who was engaged in a partnership, being outwitted by the other partners, had renounced the share he had in it at the time that an affair begun with the deceased was about to yield some profit, he would be relieved. Thus, minors are restored if they have renounced inheritances, or legacies, as has been said in the tenth article.

## XIV.

2385. *The Minor is relieved from an Engagement that would run him into Lawsuits and Expenses.* — Although the engagement into which a minor had entered might not occasion him any present loss in his goods; he will nevertheless be relieved from it, if in other respects it should be disadvantageous to him. As if he had engaged in some business, or some commerce which would

payment out of his own proper money. For, on his part, he had acquitted himself of a duty that was incumbent on him, and had acted the part of a good and prudent manager, and the creditors on their part had received nothing but what was justly due to them, and of which they might have been paid out of the goods of the inheritance, which they might have got exposed to sale before they had perished, if the minor had renounced the inheritance, or, having accepted it, if he had not prevented their diligence at law by making the said payment with his own money.

\* L. 24, § 2, D. de minor.

† L. 7, § 6, D. de minor.; — l. 44, cod.; — l. 17, § 3, D. de usur. See the tenth article.

run him into lawsuits, expenses, or other consequences, which it would have been his interest to have avoided and prevented; or if he had accepted an inheritance encumbered with affairs that would have required a long and tedious discussion."

## XV.

- 2386. *The Minor is relieved against a Compromise.* — If a minor has referred some matter in dispute to an arbitration, he may be restored against it, even although he had been authorized by his tutor to compromise the matter.\* For although it be usual for prudent and wise persons to put their rights into the hands of arbitrators, yet the minor may have been deceived either in the choice of the arbitrators, or in referring to arbitration a right that is indisputable. And although his tutor had authorized him to consent to the said reference, yet nevertheless he would be relieved against it.†

## XVI.

2387. *Restitution against an Omission.* — Minors are not only relieved against what they may have done to their own prejudice, but they may likewise have relief for having omitted that which they were obliged to do, in the cases where this omission may be repaired. Thus, for example, if the father of a minor, having purchased an estate on condition that, if the price were not paid by a certain time, the sale should be made void; the minor, heir to his father, omits to pay the money within the time, and even although the minor's guardian have been summoned to pay the same, and for default of payment the seller has been restored to his estate, whether it were with the consent of the guardian or by a sentence of the judge, yet the minor may be admitted to take possession again of the estate, he paying the price.‡ Unless it should happen that, by reason of particular circumstances, the things were not any more in such a condition as that the minor ought to be received to make payment; as if the sale had not been vacated till after a long time, and after many delays granted to

\* L. 6, D. de minor.; — l. 4, in f. D. ad senat. Trebell. Although this law has relation to another subject, yet these words may be applied here. See the tenth article.

† L. 34, § 1, D. de minor.

‡ See the nineteenth article.

\* L. pen. C. de in int. rest. min.; — l. 38, D. de min. See the eighteenth article of the fourth section of Covenants, and the twelfth article of the twelfth section of the Contract of Sale.



him for paying the price to the seller, who, having occasion for the money to acquit pressing debts, had been obliged to sell the estate to avoid a seizure of his goods which had been made by a creditor:

## XVII.

2388. *The Minor is relieved against an Obligation for borrowed Money, if he has not laid out the Money to his Advantage.* — It is not enough to hinder the restitution of a minor, who is bound in a bond for money which he borrowed, that he has actually received the sum that was lent him, but it is likewise necessary that he have laid it out to a profitable use. Thus, the minor, who, having borrowed a sum of money, has made no good use of it, as if he has squandered it away foolishly, or even if he has lent it to a debtor that is insolvent, will be relieved upon his making over his right to his creditor.<sup>a</sup> For he who lends ought to know the condition of his debtor, whether it be a major or a minor;<sup>b</sup> and knowing him to be a minor, he ought to have taken care to see the money which he lent him applied to a good and profitable use.<sup>c</sup>

## XVIII.

2389. *Restitution between Two Minors.* — If, two minors treating together, one of them is wronged by the fraud of the other, he shall be relieved in the same manner as he would be against a major. And if the minor who has cheated the other has received of him any money, he shall be bound to restore it, although the money were not any more in his possession, and even although he had reaped no benefit by it. And he will also be liable for the costs and damages which his fraud may have occasioned. And the minor would be likewise bound in the same manner to a major whom he had cheated.<sup>d</sup> But if one of two minors is under an engagement to the other to do or to give something which turns to his prejudice, he shall likewise be relieved from it, although there had been no fraud on the part of the minor to whom he is engaged. For his being wronged in his minority entitles him to a relief from his engagement, without any regard to the

<sup>a</sup> L. 7, § 1, D. *de min.*; — L. 27, § 1, D. *cod.*

<sup>b</sup> See the seventh article of the fifth section of *Covenants*, and the second text before quoted upon the eighth article.

<sup>c</sup> L. 3, § 9, in fine, D. *de in rem verso*.

<sup>d</sup> L. 3, C. *si min. se maj. dis.* See the fifth and sixth articles.

quality of the person to whom he is obliged, and that even although his restitution should be to the loss of the other minor. Thus, for example, if a minor had bound himself surety for a debtor of another minor, he would be restored, although, the debtor proving insolvent, the minor who is creditor should lose his debt. And if it should happen that both the minors were wronged, when there was no fraud on the part of the one or the other, he who is under an engagement to the other, the performance whereof would be prejudicial to him, will be relieved from it. Thus, for example, if a minor, having borrowed money of another minor, has no longer the said money in his possession, and has not laid it out to any profitable account, he will be relieved from his obligation to pay back the said money, although the other be a loser thereby. For seeing, in all the cases of this nature, the obligation of the minor for a cause which has no ways turned to his advantage ought to be annulled, the consequence of the loss which happens thereby to him who had treated with the minor does not alter his right, nor validate his obligation. But this loss is considered either as a mere accident, or as an event which he who had treated with a minor ought to blame himself for. Thus, in general, when two minors have had any dealings with one another, and when there is damage done, either to one of them alone, or to both of them, and it is not possible to restore both the one and the other to the condition in which they were before; the judgment in relation to the restitution ought to depend on the quality of the facts and circumstances, and on the condition into which the event shall have put the one and the other, to relieve him who shall be found to be under an engagement, the execution whereof would do him such a prejudice as might be a just ground for annulling the engagement.

# XIX.

2390. *The Authority of the Tutor does not hinder the Restitution; and the Minor is restored even against the Act of the Tutor.* — Although the minor has been authorized by his tutor to pass the act or deed against which he desires to be relieved, yet the restitution will nevertheless have its effect, even although the tutor were father of the minor, and intrusted with the management of the son's estate. And although it were an act sped in a court of

justice, yet the minor may be relieved against it, if there be just ground for it. And it would be the same thing in whatever the tutor shall have transacted in that quality without the presence of the minor, if it appears that he is wronged by the act of the tutor. For the power of the tutor is limited to what may be profitable for the minor.<sup>f</sup>

## XX.

2391. *Minority ends at Five-and-twenty Years complete.* — The minority ends only at the last moment of the five-and-twentieth year complete, to be reckoned from the moment of the birth of the person who sues for relief. Thus, the minor may be restored against acts which have preceded this last moment. And the years are computed in such manner, that the two days which are called bissextile, which, according to our computation, are the twenty-eighth and twenty-ninth of February, are only reckoned as one. For both the one and the other are of the same year, at what moment soever it may have begun.<sup>g</sup>

## XXI.

2392. *The Surety of a Minor.* — The restitution which vacates the obligation of the minor does not vacate that of his surety, unless it be that the restitution of the minor is founded on the fraud of his adverse party,<sup>h</sup> or upon some other vice of the obligation, which ought to have this effect; pursuant to the rules which have been explained in the title of *Sureties*.<sup>i</sup>

<sup>f</sup> L. 2, C. si tut. vel cur. interv.; — l. 29, D. de minor.; — v. l. 3, §§ 5 et 7, eod.; — l. 7, § 3, D. pro emptore. See the twenty-fourth article of this section, and the tenth article of the second section of *Tutors*.

<sup>g</sup> L. 3, § 3, D. de min. The origin of this word *bissextile* is sufficiently known, so that it is not necessary to explain it here. It sufficeth to remark in this place, that, as the day which is added in the bissextile or leap-year, is a day composed of the hours which the annual course of the sun exceeds 365 days, and which make up one entire day every four years, so this day makes a part of those four years. So that it ought to be reckoned in the number of the years necessary to attain majority. And every leap-year is counted only for one year, although it have a day more than others. From whence it follows, that he, for example, who is born on the twenty-eighth of February, and whose five-and-twentieth year happen on a leap-year, will remain minor till the twenty-ninth day, and the hour of his birth on that day.

<sup>h</sup> L. 2, C. de fidejuss. min. See the tenth article of the first section of *Sureties*.

<sup>i</sup> See the second, third, fourth, and fifth articles of the fifth section of the same title of *Sureties*.

## XXII.

2393. *Dispensation of Age.* — When the conduct of minors appears to be such, that, before they attain the years of majority, they are judged capable of the administration of their own affairs, the law allows the same to be granted to them by letters of dispensation of age, which sons may obtain at the age of one-and-twenty years complete, and daughters after they are past eighteen. And this dispensation of age hath this effect, that they may take the management of their estates into their own hands, and look after them themselves, but they may not alienate them, nor mortgage them.<sup>1</sup> Thus, the dispensation of age does not hinder the restitution of minors, except in what relates to this enjoyment of their estates, and not as to acts or deeds which minors may do afterwards to their prejudice, either by alienating or mortgaging their estates, or otherwise. Neither hath the said dispensation of age the effect to make those who have obtained it be reputed majors, when the question is touching the accomplishment of a condition of a legacy, of a substitution, or other matter which should have its effect by their majority; unless the said condition did mention the case of a dispensation of age.<sup>m</sup>

## XXIII.

2394. *The Ratification of an Act, after one is come of Age, hinders the Restitution.* — If an act or deed, executed by a minor, were not to take effect till after he arrived at the years of majority, he would nevertheless be restored against it, if he were wronged by it. But if, after he has come of age, he executes it, or does any other act in approbation of it, he cannot afterwards be relieved against it. And, in general, every act of approbation made by a major of what he did in his minority makes the restitution to cease. Thus, he who during his minority had approved of the testament of his father, which he might have procured to be annulled, and who might have been relieved against his said approbation thereof, will not be admitted to oppose it, if, after he has attained the years of majority, he receives or demands a legacy which his father had left him by the said testament. Thus, he who might have been relieved against a bond which he had given in his minority, but who after he is arrived at full age makes a pay-

<sup>1</sup> L. 2, C. de his qui ven. etat. impetr.; — d. l. 4 1; — v. l. 3, D. de min.: — L. 1. end.

<sup>m</sup> L. ult. C. de his qui ven. et. impetr.

ment to his creditor, either of the whole or of a part of the debt, cannot afterwards sue for restitution. But if a minor who during his minority had engaged himself in an affair which was attended with a great many consequences, and linked with many other affairs, such as an inheritance, and who had, a little time after he was become major, received payment of some debt owing to the said inheritance, whether it were to prevent the loss of the debt, or to pay off with that money another pressing debt, and should at the same time demand to be relieved, he might be excused, if the circumstances should show that what he had done after he was come to majority was not so much an approbation of his taking upon him the quality of heir, as an act necessary for the preservation of the goods of the succession.<sup>a</sup>

#### XXIV.

2395. *The Immovables of Minors cannot be alienated without Necessity.* — The laws have not only provided for the restitution of minors, but they have, moreover, forbid the alienation of their immovable goods. And although the minor were not wronged in the price of the sale of his lands or tenements, yet he would be relieved against the sale thereof, if it were for no other reason but because it is more profitable for him to keep his lands and tenements than to have the price thereof. Thus, minors are restored against all sales of their lands and tenements, whether they have been sold by themselves, or by their tutors, under color of a transaction, an exchange, barrenness of the lands, or other pretext whatsoever.<sup>b</sup> But if it should be necessary to sell the immovables of a minor in order to pay off his debts, the same might be sold after that the sale thereof has been directed by a court of justice, and provided the formalities therein observed which shall be explained in the following article.<sup>c</sup>

<sup>a</sup> L. 3, § 1, *D. de minor.*; — l. 2, *C. si maj. fact. rat. hab.*; — l. 30, *D. de min.*; — l. 7, § ult. *D. de senatusc. Maced.* Although this law relates to another subject, yet it may be applied to this. L. 3, § 2, *D. de minor.* This heir receiving in this manner a payment would more effectually preserve his right to a restitution by entering a protest by some act.

<sup>b</sup> L. 1, *D. de reb. cor. qui sub tut.*; — l. 4, *C. de præd. et al. reb. xxi. s. d. n. al.*; — l. 13, *D. de reb. cor. qui sub tut.*; — l. 22, *C. de adm. tut.* See the remark on the thirteenth article of the third section of Tutors.

<sup>c</sup> L. 12, *C. de præd. et al. reb. min.* See the following article, and the fourth article of the second section of Tutors.

## XXV.

2396. *Formalities observed in the Sale of the Immovables of Minors.* — To justify the alienation of any of the lands or tenements belonging to a minor, it is required that the sale be made for a necessary cause, such as paying off debts that are pressing, of which the payment cannot be delayed, and which cannot be acquitted any other way; that this sale be directed by a court of justice, after it has been made appear, by producing an inventory of the goods of the minor, and a stated account given in by the tutor, that there is neither money nor movables nor debts nor rents due, or to become due, nor other effects that may suffice for the payment of the said debts; so that it is necessary to alienate some of the lands or tenements. And it is likewise necessary to make choice, for the said sale of the lands or tenements, of those that are of least value, and that no more of them be sold than what is absolutely necessary, that they be sold by cant or auction, by order of the judge, after the delays which have been regulated, and the advertisements for giving notice to the parties concerned, and the buyers, and lastly, that the price of the sale be applied to the payment of the debts.<sup>a</sup>

## XXVI.

2397. *A Sale made by the Tutor, without observing the Formalities.* — If the tutor, being pressed by the creditors of the minor, and in order to prevent or stop a seizure of his goods, sells some of the immovables of the estate without observing the formalities required, the minor may be restored against the sale.<sup>r</sup>

## XXVII.

2398. *Effect of the Rescission against the Tutor, if there be Ground for it, and also against the Possessor.* — If the alienation of the lands or tenements of a minor be liable to be rescinded, he will have his action, not only against his tutor, if there be ground for

<sup>a</sup> L. 1, § 2, D. de reb. cor. qui sub tut.; § 1, l. 5, § 9, D. eod.; — d. l. 5, § 14; — l. 5, C. de præd. et al. reb. min.; — l. 5, § 15, D. de reb. cor. qui sub tut. • The formalities for the sale of the goods of minors are the same with those used in the sale of estates seized by creditors, and sold by decree of a court of justice. And it is only a decree of a court of justice, in due form, that can sufficiently secure him who purchases lands or tenements belonging to minors.

<sup>r</sup> L. 47, D. de minor. See the nineteenth, the twenty-fourth, and twenty-fifth articles of this section.

but likewise against the possessor of the lands and tenements that have been alienated."

## XXVIII.

2399. *Improvements made by the Purchaser of Lands and Tenements belonging to a Minor.*—If he who has purchased lands or tenements belonging to a minor has laid out money upon them in making considerable improvements; as, for example, if, having bought only the ruins of an old house, he has built a great house upon it, and the minor, having on his part just cause of restitution, demands the sale to be vacated; he cannot enter again to the possession of the said estate, without refunding the expenses which have been laid out upon it, and of which he ought not to reap the benefit, to the prejudice of the purchaser! especially, if it should appear that the minor's tutor or guardian ought to answer for the said alienation, and that he were solvent. For in this case the minor would recover his costs and damages against his tutor. But if he enters again to the possession of his estate, reimbursing the purchaser for the improvements he has made, the expenses which he has been at for things which serve only for pleasure will not be reckoned as improvements. And the purchaser will only have liberty to take away such of those things destined for pleasure as may be removed without changing the condition in which the places were before the alienation."

## XXIX.

2400. *Restitution of a Purchase made by a Minor.*—Although the minor by a purchase of lands makes his condition better, yet nevertheless, if he buys them at too dear a rate, or if he buys lands that will be chargeable to him, he will be relieved, whether he has paid the price with his own money, or whether he has borrowed it for that purpose. And both in the one and, the other

\* L. 5, § 15, *D. de reb. cor. qui sub tut.* See the sixth article of the first section.

\* L. 39, § 1, *D. de minor.*

\* L. 32, § 5, *D. de ad min. et per tut.* See the sixteenth and following articles of the tenth section of the *Contract of Sale*, and the twelfth and subsequent articles of the third section of the title of *Dowries*.

But if the minor, who might be restored to the possession of his estate upon his refunding the expenses laid out upon those improvements, should not be able to refund the said expenses, and if the estate had not been sold for its just value, it would be reasonable that the purchaser, whose title is liable to be vacated by the rescission, should pay to the minor the supplement of the price which he ought to have paid at the time of the purchase.

case, he will recover the interest of the price from the day that he paid it, he giving back to the seller the value of the fruits of which he has reaped the advantage.\* Unless it should appear to be just and equitable to compensate the fruits with the interest.

### SECTION III.

#### OF THE RESCISSION OF CONTRACTS IN FAVOR OF MAJORS.

2401. *The Subject-Matter of this Section.* — There are causes of rescissions in favor of majors, which are common to all persons of both sexes; as if one has been deceived by some trick, or forced by some violence: and there are other causes which are peculiar to some persons. Thus, by our usage, married women, although of age, cannot oblige themselves without the authority of their husbands; and by the customs of some provinces they cannot bind themselves even although they have their husbands' consent. Thus, fathers, whose children, although majors, have borrowed money for their debauches, may procure their obligations to be annulled, if it appear that the obligations have this vice in them; and the sons themselves may have relief in this case, according to the circumstances. As to what concerns the obligations of married women, that has been explained in the remarks on the first article of the first section of the title of *Persons*; and what relates to the obligations of sons has been treated of in the fourth section of the title of the *Loan of Money, and of Usury*; and here we shall speak only of the other rescissions which are common to all majors.

2402. Seeing the rescissions which majors may obtain are founded on the vices which happen to be in the acts or deeds which they complain of, such as those which have been treated of in the title of the *Vices of Covenants*, we shall not therefore repeat here what has been said of this matter in that title: it will suffice if we acquaint the reader, that the rules explained in that title ought to be applied to rescissions in favor of majors, according as the rules may be applicable to them; and that it is chiefly from the said rules that we are to draw all the principles relating to this matter; so that there remain but few rules concerning it to be set down in this title.

\* L. 27, § 2, D. de minor:



## ART. I.

2403. *The Vices of Covenants are the Causes of Rescission in Favor of Majors.* — The vices of covenants are so many causes of rescission, which majors may make use of for obtaining relief, against acts or deeds which have any one of the said vices in them, provided it be such as may be a sufficient ground to found the rescission upon. Thus, a major who has entered into an obligation, being a madman or a declared prodigal, may be relieved. Thus, a major who has engaged himself through some error or mistake, or by the fraud and tricking of the party with whom he had to do, or by reason of some violence which may have forced him to give his consent, will procure those acts or deeds to be repealed in which any of the said causes shall be found, pursuant to the rules which have been explained in the title of the *Vices of Covenants*.<sup>a</sup>

## II.

2404. *Fraud between Coheirs.* — If, in the case of two coheirs, one of them, being ignorant of some titles or estates of the inheritance, which were known to the other, has been engaged by his coheir to treat with him under this ignorance, without having justice done him as to his share of the goods which the coheir concealed from him, he will procure that which has been done in this fraudulent manner to be annulled, and will recover such costs and damages as the quality of the act shall deserve; even although there had been a transactio<sup>n</sup>, if it be evident that this fraud gave occasion thereto.<sup>b</sup>

## III.

2405. *Rescission of a Partition.* — If in a partition among majors there be any considerable wrong done, although there be neither fraud nor knavery on the part of any of the persons concerned in the partition, yet he who is aggrieved may demand a new partition.<sup>c</sup>

## IV.

2406. *Rescission of a Sale because of Damage sustained in the Price.* — Majors may also procure contracts of sale to be re-

<sup>a</sup> See the whole title of the *Vices of Covenants*, and the remark there made on usurious contracts, at the end of the preamble.

<sup>b</sup> L. 9, § 2, *D. de transact.*

<sup>c</sup> L. 3, *C. comm. utr. jult. tam fam. etc. q. c. d.* See the ninth article of the sixth sec-

rescinded, if they have sold any lands or tenements for less than the half of their just value, pursuant to the rules which have been explained in their proper place.<sup>d</sup>

## V.

• 2407. *Restitution, on Account of Absence, or for some other just Cause.*—Majors not only procure acts or deeds to be rescinded, to which they have been parties, when there is sufficient ground for rescinding them; but they likewise obtain reparation of what has been done without their knowledge, if they have received any prejudice thereby, and if they have just cause for demanding the same to be annulled. • Thus, a major who has been absent is relieved against a prescription, pursuant to the rule that has been explained in its place. Thus, an absent person, who has been condemned for contumacy on the head of some accusation, is admitted to make his defence when he appears. And, in general, majors may obtain a redress of the wrong which they may have suffered when they were not in a condition to exercise their rights, or to defend themselves against any thing attempted to their prejudice. And whether their demand be to recover the possession of any goods usurped from them, or to obtain reparation of some loss, or even to recover some right which had accrued to them, such as a legacy or an inheritance, and in all other cases, provision will be made therein according as their pretension is well or ill grounded, and according as equity may require in the circumstances of the case: observing, likewise, this against majors, that they be not allowed to reap any benefit, either by their absence, or by the other causes which procure them restitution to their right, so as to cause any prejudice thereby to other persons. •

tion of *Covenants*. According to our usage, the party aggrieved may demand a new partition, if the wrong done him be between a fourth and a third part.

<sup>d</sup> See the fifth section of the *Contract of Sale*.

• *L. 1, D. ex quib. caus. maj.*; — *d. l. in f.*; — *l. 26, § 9, cod.*; — *l. 27, cod.*; — *l. 3, C. quib. ex caus. maj. in int. rest.*; — *l. 1, cod.*; — *l. 140, D. de reg. jur.*; — *l. 21, D. ex quib. caus. maj.* See the sixth article of the fifth section of *Possession*. We have not put down in this article that which relates to the effect of absence in majors, according to the usage of the Roman law, with respect to sentences pronounced against them. For seeing by our usage absent persons may be cited, in the manner regulated by the ordinances, and that they have the remedy of appealing from sentences pronounced in their absence, after they have been cited in due form, our usage does not allow of restitution against sentences.



